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No. 08-423

Supreme Court, U.S.
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In The
Supreme Court of the United States

TIMOTHY AND ANDREA SPACHT, Individually and as Next Friend of N.S., a Minor,

Petitioners,

v.

DR. WENDY A. TROYER, DR. WILLIAM G. KEYES, DR. JAMES THOMSEN, DR. VERLIA GOWER,

Respondents.

On Petition For A Writ Of Certiorari To The Georgia Supreme Court

SUPPLEMENTAL BRIEF AND APPENDIX

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SUPPLEMENTAL BRIEF AND APPENDIX

COME NOW Petitioners and briefly supplement their Brief in this case to explain the purpose of the contents of the supplemented appendix in this case.

The motions by respondents Troyer, Keyes, Thomsen and Gower are attached in the appendix to confirm that neither of those motions sought hearings pursuant to O.C.G.A. § 24-9-67.1(d). Further, their motions were moot by the time of oral hearing, pursuant to *Northlake Medical Center v. Queen,* 280 Ga. App. 510 (2006) with regard to the medical authorization issues; and *Cotten v. Phillips,* 280 Ga. App. 280, 633 S.E. 2d 655 (2006) and *Abramson v. Williams,* 281 Ga. App. 617, 636, S.E. 2d 765 (2007), with regard to the overlap issue and the issue of whether an expert is required to practice in the same specialty as that of the negligent Defendant doctor.

The Trial Judge's 15-page Pre-Hearing Order (already appended to this case at page 17 in Petitioner's original Application) shows that Judge Flake spent 15 pages detailing her inability to decide the overlap issue, and that the O.C.G.A. § 24-9-67.1(d) hearing referenced in the final page of that Order was clearly to resolve the overlap issue, and a *Daubert* or O.C.G.A. § 24-9-67.1(d) hearing was not requested by either party or the Court.

Judge Roach's Order of December 22, 2006, (already appended to the original Petition at page 39) shows that no *Daubert* request was made pursuant to O.C.G.A. § 24-9-67.1(d), no *Daubert* argument was

had, no *Daubert* analysis was done, and no *Daubert* evidence was presented at the hearing on Defendants' Motion to Dismiss.

The transcript of the hearing on Defendants' Motion to Dismiss shows that the issue argued by the parties was whether an expert was required to practice in the same specialty as that of the negligent Defendant doctor. As indicated, this issue was moot by the time of the hearing pursuant to *Cotten v. Phillips,* 280 Ga. App. 280, 633 S.E. 2d 655 (2006) and *Abramson v. Williams,* 281 Ga. App. 617, 636, S.E. 2d 765 (2007), *supra.*

The "hearing" pursuant to O.C.G.A. § 24-9-67.1(d) or *Daubert,* which was the basis for the Georgia Court of Appeals' overnight internal reversal in this case, manifestly *never* occurred.

The Petitioners respectfully suggest this case should be remanded to the Trial Court, to at least conduct the non-existent "hearing" upon which the Georgia Court of Appeals dismissed this case.

THIS 2nd day of December, 2008.

Respectfully submitted,

GREER, KLOSIK, DAUGHERTY,
SWANK AND MCCUNE
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IN THE SUPERIOR COURT
OF DEKALB COUNTY
STATE OF GEORGIA

TIMOTHY AND ANDREA SPACHT, INDIVIDUALLY AND AS NEXT FRIEND OF N.S., A MINOR Plaintiffs, v. CHILDREN'S HEALTHCARE OF ATLANTA, INC., DR. WENDY A. TROYER, DR. WILLIAM G. KEYES, DR. JAMES THOMSEN DR. VERLIA GOWER, DR. THEODORE BRAND, DR. JOHN BLEACHER Defendants.	)	Civil Action No: Second Original

COMPLAINT FOR DAMAGES

(Filed March 24, 2006)

COMES NOW, Timothy and Andrea Spacht, Individually and as Next Friend of N.S., a minor, Plaintiffs, and file this their Complaint against Children's Healthcare of Atlanta, Inc., Dr. Wendy A. Troyer, Dr. William G. Keyes, Dr. James Thomsen Dr. Verlia Gower, Dr. Theodore Brand, Dr. John Bleacher individually and collectively, and in doing so, show the Court the following:

App. 2

1.

Defendant Children's Healthcare of Atlanta, Inc. is a corporation incorporated under the laws of Georgia, and which may be served by second original upon its registered agent, Corporation Service Company, 40 Technology Pkwy South, #300, Norcross, Gwinnett County, Georgia, 30092. This Defendant is subject to the venue and jurisdiction of this Court.

2.

Defendant Dr. Wendy A. Troyer is a resident of XXXX XXXXXXXX XXX, Dunwoody, Dekalb County, Georgia, 30338, and may be served at that address. This Defendant is subject to the venue and jurisdiction of this Court.

3.

Defendant Dr. William G. Keyes is a resident of XXXX XXXXXXXX XXXXXXXXXX, Dunwoody, Georgia, Dekalb County, Georgia, 30338, and may be served at that address. This Defendant is subject to the venue and jurisdiction of this Court.

4.

Defendant Dr. James Thomsen is a resident of XXX XXXXXXXX XXXXX XXXX, XX, Atlanta, Fulton County, Georgia, 30342 and may be served by second original at that address. Defendant Dr. James

Thomsen is subject to the jurisdiction and venue of this Court.

5.

Defendant Dr. Verlia Gower is a resident of XXXX XXXXXX XXXX, Austell, Cobb County, Georgia, 30106 and may be served by second original at that address. Defendant Dr. Verlia Gower is subject to the jurisdiction and venue of this Court.

6.

Defendant Dr. Theodore Brand a resident of XXXX XXXXXX XXXXX XX, Marietta, Cobb County, Georgia 30068 and may be served by second original at that address. Defendant Dr. Theodore Brand is subject to the jurisdiction and venue of this Court.

7.

Defendant Dr. John Bleacher is subject to the jurisdiction and venue of this Court and may be served by second original at 5455 Meridian Mark Road, Suite 570, Atlanta, Fulton County, GA 30342.

COUNT I

8.

This action is one for professional malpractice in which one or more of the Defendants have failed to exercise the required degree and standard of care

causing injury and permanent damage to N.S., all of which could have been avoided if one or more of the Defendants recognized and treated by division, the vascular ring identified on the results of a March 12, 2002 CAT scan.

9.

Plaintiffs, pursuant to O.C.G.A. §9-11-9.1, have attached as Exhibit "A" their Affidavit specifically setting forth at least one negligent act or omission claimed to exist, and the factual basis for each claim.

10.

Defendant Children's Healthcare of Atlanta Inc. held out Defendants Wendy Troyer, William Keyes, Dr. James Thomsen, Dr. Verlia Gower, Dr. Theodore Brand and Dr. John Bleacher as being employees, giving its patients a reasonable belief that said Defendants were acting as agents or employees at all times herein, and Defendant Children's Healthcare of Atlanta Inc. is responsible for any acts or negligence of Defendants Wendy Troyer William Keyes, James Thomsen, Verlia Gower, Theodore Brand and John Bleacher

11.

The records from Children's Healthcare of Atlanta, including the CAT scan taken on March 12, 2002 reveal that N.S. had a vascular ring which

encircled his trachea and esophagus, thus preventing him from getting sufficient oxygen to his lungs, and being able to swallow.

12.

The March 12, 2002 CAT scan established that N.S. suffered from the most common type of vascular ring, a right aortic arch with aberrant left subclavian. This is an abnormal arrangement of vessels in the chest that encircle and compress the trachea and esophagus.

13.

The symptoms suffered by N.S., airflow difficulty, noisy respiration, swallowing difficulty, and failure to thrive were a direct result of the compression caused by the vascular ring.

14.

A vascular ring is surgically divided in all symptomatic patients. To avoid serious complications such as sudden death or significant tracheal or bronchial damage, surgery should not be delayed, especially in patients with symptoms of airway compression such as N.

15.

N.S. treating physicians named as Defendants herein ignored and/or failed to read the CAT scan results and proceeded with an unnecessary tracheotomy, salivary gland excision, nissen fundoplication, and g tube, causing N.S. severe pain and permanent damage, all of which could have been avoided if one or more of the Defendants recognized and treated by division, the vascular ring identified on the results of the March 12, 2002 CAT scan.

16.

Wendy Troyer and William Keys [sic], who were working at Children's Healthcare on March 12, 2002, and who had ordered the CAT scan for N.S., failed to read and act upon the results of the CAT scan, which established that N.S. suffered from a vascular ring.

17.

Dr. Thomsen failed to read or act upon the results of the CAT scan which established that N. suffered from a vascular ring, and kept in place an unnecessary tracheotomy, referring to N. as tracheotomy dependent.

18.

N.S. lived with a tracheotomy tube in place for the first two and a half years of his life. As a result, he could not suck, swallow, eat or talk. He had home

nursing care 12 hours a day 7 days a week. He required frequent assessments and vital signs, he needed breathing treatments every 6 hours, 4 hours if he was sick, and his tracheostomy needed suctioning every 5 minutes, or less when he was awake. His tracheostomy ties had to be changed at least 2 times a day and his tracheostomy had to be removed completely and replaced at least 2 times a week, at home. N. required physical therapy, oral therapy and speech therapy two times a week. He is almost four now and still requires therapy to learn how to eat and swallow his food properly.

19.

When Dr. Kanter divided the vascular ring two and a half years later on July 13, 2004, he stated in his operative notes that he divided the vascular ring after he "reviewed the old CAT scan which suggested a vascular ring." At the same time, N. was decannulated.

20.

Not only was N. not tracheostomy dependent, the tracheostomy was never required.

21.

Dr. Brand ignored the results of the CAT scan and performed an Open Nissen Fundoplication and Gastrostamy to prevent reflux.

22.

On October 18, 2002, Dr. Gower performed a submandibular gland excision and parotid duct ligation because N. could not swallow his own oral secretions. This is a major procedure which N. did not need, had the vascular ring been identified and divided this surgery could have been avoided. Surgical division of the vascular ring would have fixed the root cause of the problem by alleviating the compression on his esophagus.

23.

Defendants Children's Healthcare of Atlanta, Inc., Dr. Wendy Troyer, Dr. William Keyes, Dr. James Thomsen, Dr. Verlia Gower, and Dr. Theodore Brand negligently failed to follow generally accepted and customary medical practices and failed to exercise the degree of care generally employed by medical professionals under similar conditions and like surrounding circumstances by failing to diagnose and treat by surgical division and/or refer Plaintiff N.S. elsewhere for proper treatment of his vascular ring.

24.

Plaintiffs show that the negligence of the Defendants was the proximate cause of Plaintiff N.S.'s permanent damage and injuries as caused by the unnecessary procedures that he underwent because of Defendant's [sic] failure to properly treat his vascular ring.

25.

Plaintiffs show that as a result of the negligence of Defendants, Plaintiff N.S. has suffered and continues to suffer pain, physical, mental and emotional disability and will continue to suffer such pain and suffering in the future because of the permanent damage caused by the unnecessary procedures that he underwent.

COUNT II

26.

Plaintiffs incorporate by reference Paragraphs 1 through 25 of Plaintiffs' Complaint as though the same were specifically set forth herein.

27.

Plaintiff Timothy and Andrea Spacht are the mother and father of Plaintiff N.S.

28.

By reason of Defendants' Children's Healthcare of Atlanta, Inc., Dr. Wendy A. Troyer, Dr. William G. Keyes, Dr. James Thomsen Dr. Verlia Gower, Dr. Theodore Brand, Dr. John Bleacher negligent conduct, and the injuries suffered and sustained by Plaintiff N.S. as a direct and proximate result thereof, Plaintiffs Timothy and Andrea Spacht have been deprived of their son's society and companionship and such

deprivation will continue to the general damage of Plaintiffs Timothy and Andrea Spacht.

29.

By reason of Defendants' negligent conduct, Plaintiffs Timothy and Andrea Spacht have incurred medical expenses and bills on behalf of their son N.S. and it appears that such will continue to the damage of Plaintiffs Timothy and Andrea Spacht.

30.

Defendants are therefore jointly and severally liable to Plaintiffs in an amount to be proven by the evidence at trial.

WHEREFORE, Plaintiffs prays [sic] for the following:

(a) That Plaintiffs Andrea Spacht and Timothy Spacht recover on behalf of N.S. judgment against Defendants in an amount in excess of $10,000 for the injuries and pain and suffering of N.S., past present and future;

(b) That Plaintiffs Andrea Spacht & Timothy Spacht have judgment against Defendants jointly and severally in an amount in excess of $10,000 for loss of consortium services and medical expenses past and future;

(c) For trial by jury;

(d) For the costs of this action to be assess [sic] against Defendants; and

(e) For such other relief as this Court deems just and proper.

THIS 22nd day of March, 2006.

GREER, KLOSIK, DAUGHERTY, SWANK AND MCCUNE

BY: /s/ Alina Krivitsky
FRANK J. KLOSIK, JR.
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State Bar No.: 142056
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AFFIDAVIT OF DAVID L. SCHWARTZ, M.D., F.A.C.S., F.A.A.P.

STATE OF NEW YORK
COUNTY OF _____

BEFORE ME, the undersigned officer duly authorized to administer oaths, came David L. Schwartz M.D., F.A.C.S., F.A.A.P., who after being duly sworn, states the following;

1.

My name is David L. Schwartz, and I give this affidavit based on my review of certified medical records from Children's Healthcare of Atlanta concerning the treatment of N.S. from January 15, 2002 until July 13, 2004, which include the following: summary history and physical, anesthesia record, preoperative and postoperative reports and records, post operative orders, preoperative checklists, admission records, patient's history, orders, physician's progress, nurses reports, clinic notes, diagnostic reports and examinations, including laboratory reports, x-ray reports, CAT scan reports, symptomology review.

2.

Based upon my review and analysis of the certified records of Children's Healthcare of Atlanta, it is my opinion with a degree of medical certainty that there were deviations from the acceptable standard of

care by Dr. Troyer, Dr. Keyes, Dr. Thomsen, Dr. Gower, Dr. Brand, Dr. Lewis and Dr. Bleacher in the following manner:

(A) Wendy Troyer and William Keys [sic], who were working at Children's Healthcare on March 12, 2002, and who had ordered a CAT scan for N.S., failed to read and act upon the results of CAT scan, which established that N.S. suffered from a vascular ring, of which he had the most common type, a right aortic arch with aberrant left subclavian. In this condition, an aberrant origin of the left subclavian artery is present, which originates as the last branch of the aortic arch (distal to the right subclavian artery). The ring is completed by a left-sided ductus arteriosus (or its remnant ligamentum arteriosum) passing from the aberrant left subclavian artery to the proximal left pulmonary artery. It is an abnormal arrangement of vessels in the chest that encircle and compress the trachea and esophagus. The symptoms suffered by N.S., airflow difficulty, noisy respiration, swallowing difficulty, and failure to thrive were a direct result of this compression, and the diagnosis should have been clear and surgical division should have been scheduled on March 12, 2002, the date of the CAT scan. It is my opinion that there is absolutely no reason why this should not have been done when symptomology was clear and definitive imaging results were in hand.

(B) The bilateral submandibular gland excisions and bilateral parotid duct ligations were unnecessary procedures that could have been avoided. Surgical division of the vascular ring would have fixed the root cause of the problem by alleviating the compression on his esophagus, thus allowing N. to swallow correctly. Dr. Gower should have reviewed the history, including all radiology reports prior to performing the bilateral mandibular gland excision and bilateral parotid duct ligations. If she had reviewed the March 12, 2002 CAT scan report, she would have seen that N. suffered from a vascular ring and she could have avoided this procedure and all of the negative side effects that are associated with this procedure.

(C) The establishment of a surgical tracheostomy would have been avoided if Dr. Thomsen recognized that N.'s presentation was a consequence of his vascular ring. As a result of this serious misstep, this child had an unnecessary tracheostomy and all the associated problems of a chronic tracheostomy in a very young child (i.e., infection, aspiration, pneumonia, bleeding, difficulty in swallowing, failure to thrive and time lost in speech development). It should also be emphasized, that N. underwent several general anesthesias during which endoscopies were done in attempts to determine why they were unsuccessful in trying to remove the tracheostomy; the obvious reason that tracheostomy could not be removed was that the vascular ring causing N.'s airway obstruction

was not addressed in a timely fashion. It is of importance to note that during one of his bronchoscopies and esophagoscopies, the endoscopist noted that there was an external compression of the esophageal lumen. This too was a consequence of the vascular ring.

(D) Dr. Brand diagnosed GI reflux and performed a major procedure to prevent reflux, a Nissen Fundoplication and Pyloroplasty. If he had reviewed the March 12, 2002 CAT scan report, he would have seen that N. suffered from a vascular ring and he could have avoided this procedure.

(E) Dr. Bleacher and Dr. Lewis performed a gastrostomy which would not have been needed had the vascular ring been identified and divided. If they had reviewed the March 12, 2002 CAT scan report, they would have seen that N. suffered from a vascular ring and they could have avoided this procedure.

3.

In summary N. had a vascular ring which encircled his trachea and esophagus and in so doing, interfered with the normal function of two strictures. Occlusion of the trachea prevented him from getting sufficient oxygen to his lungs and occlusion of the esophagus prevent [sic] him from being able to swallow. All of N.s' surgeries, the tracheostomy, the nissen fundoplication, the gastrostomy and the bilateral mandibular gland excision and bilateral parotid duct ligations were not necessary, had the original CAT

Scan results been recognized and treated by division of the vascular ring. The correction of the vascular ring on July 13, 2004 by Dr. Kantor [sic], at the same time he underwent open heart surgery, reversed all of his prior symptoms. Dr. Kantor [sic] stated that he "reviewed the old CAT Scan which suggested a vascular ring". In summary N. suffered many acute and chronic complications because of the failure to make a correct diagnosis of a vascular ring, even though this diagnosis was correctly made on a CAT Scan during his earliest admission to the hospital.

4.

I received my medical school training and degree 1960-1964 at Albert Einstein School of Medicine. I performed my internship and surgical residency 1964-1970 at Bronx Municipal Hospital Center. I performed my pediatric surgery residency and fellowship 1972-1974 at John [sic] Hopkins Hospital. I am board certified in pediatric surgery. I am an assistant clinical professor in surgery at Albert Einstein College of Medicine, 1974-present. I am a clinical assistant professor at New York University Medical Center, 1978-present, I am in private practice for pediatric surgery, B.S.K. Pediatric Surgical Associates, P.C., 1974-present. I am a fellow of American College of Surgeons and American Academy of Pediatrics, I am a member of American Medical Association, American Pediatric Surgical Association, Queens Pediatric Society, N.Y. State Surgical Society, N.Y. Pediatric Society and N.Y. Pediatric Surgical Society.

5.

I make this affidavit under oath, after having been duly sworn on the basis of my training and medical experience as applied to a review of the records listed above. This affidavit is executed for the purpose of being attached to and used in support of the Plaintiffs' medical malpractice complaint as required by O.C.G.A. § 9-11-9.1.

/s/ David L. Schwartz
David L. Schwartz,

Sworn to and subscribed
before me this 23rd day
of February, 2006.

/s/ Baharul Alam
NOTARY PUBLIC

BAHARUL ALAM
Notary Public, State of New York
No. 01AL8110452
Qualified in Queens County
Commission Expires May 24, 2008

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

TIMOTHY AND ANDREA SPACHT, INDIVIDUALLY AND AS NEXT FRIEND OF N.S., A MINOR, Plaintiffs, CHILDREN'S HEALTHCARE OF ATLANTA, INC., DR. WENDY A TROYER, DR. WILLIAM G. KEYES, DR. JAMES THOMSEN, DR. VERILA GOWER, DR. THEODORE BRAND, and JOHN BLEACHER, Defendants.	:	CIVIL ACTION FILE NO. 06CV4104-4

DEFENDANTS WENDY A. TROYER, M.D. AND WILLIAM G. KEYES, M.D.'S BRIEF IN SUPPORT OF MOTION TO DISMISS FOR VIOLATION OF O.C.G.A. § 9-11-9.1 AND § 9-11-9.2

COME NOW the Defendants Wendy A. Troyer, M.D. and William G. Keyes, M.D. and hereby file this Brief in Support of Motion to Dismiss, showing the Court as follows:

I. STATEMENT OF FACTS

On or about March 24, 2006, Plaintiffs filed the within matter, a medical malpractice suit. The allegations of the Complaint, including specifically paragraph 23, attempt to set forth a claim which can only be defined as one for medical malpractice, i.e., a failure to adhere to a reasonable degree of care and skill. The complaint was not accompanied by an affidavit of a competent expert as required by O.C.G.A. § 9-11-9.1, nor was it accompanied by an authorization allowing Defendants to secure all relevant medical records pursuant to O.C.G.A. § 9-11-9.2.

ARGUMENT AND CITATION OF AUTHORITY

THERE IS NO VALID AFFIDAVIT BEFORE THIS COURT SUCH AS REQUIRED BY O.C.G.A. § 9-11-9.1.

Under the laws enacted by the General Assembly of the State of Georgia in 2005, there are very specific requirements as to who can be an expert in medical practice litigation. In particular, O.C.G.A. § 24-9-67, as recently amended, requires that an expert have actual experience or knowledge in the same area of practice or field of specialty as the defendant against whom the expert's opinions are being offered. Moreover, the expert must have practiced in the same area of medicine for at least three of the last five years preceding his or her testimony, with specific experience in performing the procedure or treating the condition at issue. Such requirements apply both to

testifying experts and experts offering affidavit in support of a complaint.

In the within matter, even a brief perusal of the affidavit accompanying Plaintiffs' Complaint will show that the required expertise has not been demonstrated. While the affidavit states that he is a surgeon with the training expected in such specialty, nowhere does the affidavit indicate that this particular doctor has any experience in the field of neonatology.

Plaintiff's case thus runs afoul of that portion of O.C.G.A. § 9-11-9.1 which specifies that the plaintiff, upon filing a malpractice suit, is "required to file with the complaint the affidavit of an expert competent to testify . . . " This statutory requirement is straightforward and unambiguous. It is met only by filing an affidavit which demonstrates that the affiant is in fact an individual competent to testify under Georgia law.

To give opinions as an expert, an individual must possess the necessary qualification, which are specified by O.C.G.A. § 24-9-67.1. Subsection (a) of that statute establishes that its provisions "shall apply in all civil actions." Assuming that sufficient expertise exists, the individual may give opinions.

O.C.G.A. § 24-9-67.1(c) sets forth certain basic minimum standards to establish expertise. These requirements are unambiguous. The individual offering the opinion must have been, at the time of the alleged act about which the opinion is given,

licensed by an appropriate regulatory agency to practice his or her profession and, additionally, must have actual professional knowledge and experience in the area in which the opinion is given by virtue of having regularly engaged in "the active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the Defendant whose conduct is at issue."

That the dictates of this statute are not mere verbiage or extraneous matters foreign to the requirements of O.C.G.A. § 9-11-9.1 is specified by subsection (e) of O.C.G.A. § 24-9-67.1, which states as follows:

> An affiant must meet the requirements of this code section in order to be deemed qualified to testify as an expert by means of the affidavit required under § 9-11-9.1. (O.C.G.A. § 24-9-67.1(e)).

Clearly the legislature intended that this definition of expertise would apply to affidavits filed in support of a malpractice complaint pursuant to O.C.G.A. § 9-11-9.1.

Plaintiff has failed to meet this requirement. Nowhere does Plaintiffs' so called expert demonstrate that he would be deemed qualified under the provisions

of O.C.G.A. § 24-9-67.1. Nowhere is it specified that the individual was licensed to practice the same specialty as that of the Defendant, which is not a specialty in which surgery is performed. As appears from the affidavit of Defendants, their specialty of neonatology is a non-surgical specialty; they do no surgical procedures. There is nothing to establish that Plaintiffs' expert affidavit is given by an individual with knowledge of the standard of practice of neonatology in 2002.

It is the burden of the plaintiff to establish via an appropriate affidavit that the requisite knowledge and skill is in fact possessed by the affiant. The affidavit in question does not do so. Since the affidavit in question does not establish that Dr. Schwartz meets the requirement of O.C.G.A. § 24-9-67.1 as an expert, he cannot give a valid affidavit for purposes of O.C.G.A. § 9-11-9.1. Plaintiff's complaint must therefore be dismissed.

THE FAILURE TO FILE AN AUTHORIZATION AS REQUIRED BY O.C.G.A. 9-11-9.2 REQUIRES DISMISSAL

O.C.G.A. § 9-11-9.2 is part of the 2005 Georgia tort reform law, Senate Bill 3. In relevant parts it states that any medical malpractice action filed in Georgia shall have " . . . contemporaneously with the filing of the complaint, the plaintiff shall be required to file a medical authorization form. Failure to provide this authorization shall subject the complaint to

dismissal." No authorization was filed with the Complaint. Accordingly, under the clear reading of the statute, the within matter is subject to dismissal.

II. CONCLUSION

Given the Plaintiffs' failure to comply with the applicable law in at least two significant areas, Defendants urge that the Court dismiss Plaintiffs' Complaint against them.

Respectfully submitted this 18 day of April, 2006.

WEINBERG, WHEELER,
HUDGINS, GUNN &
DIAL, LLC

/s/ Robert G. Tanner
ROBERT G. TANNER
State Bar No. 697650
Attorney for Defendant

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(404) 876-2700

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the within and foregoing pleading on opposing counsel by mailing a copy of same in the U.S. Mail properly stamped and addressed to:

Frank J. Klosik, Jr., Esq.
Alina A. Krivitsky, Esq.
Greer, Klosik, Daugherty, Swank & McCune
4651-A Roswell Road
Atlanta, Georgia 30342

This 18 day of April, 2006.

WEINBERG, WHEELER,
HUDGINS, GUNN &
DIAL, LLC

/s/ Robert G. Tanner
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State Bar No. 697650
Attorney for Defendant

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IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

TIMOTHY AND ANDREA SPACHT, INDIVIDUALLY AND AS NEXT FRIEND OF N. S., A MINOR, Plaintiffs, v. CHILDREN'S HEALTHCARE OF ATLANTA, INC., DR. WENDY A. TROYER, DR. WILLIAM G. KEYES, DR. JAMES THOMSEN, DR. VERLIA GOWER, DR. THEODORE BRAND AND DR. JOHN BLEACHER, Defendant.	)	CIVIL ACTION FILE NO. 06CV4104-4

AFFIDAVIT OF WILLIAM G. KEYES, M.D.

STATE OF GEORGIA

COUNTY OF DEKALB:

PERSONALLY APPEARING BEFORE ME, the undersigned attesting officer duly authorized to administer oaths, William G. Keyes, M.D., who, upon oath, deposes and says as follows:

1.

My name is William G. Keyes, M.D. I am an adult, more than 21 years of age, and suffering under

no disability. As such, I am competent to testify to the facts recited herein.

2.

Following graduation from the University of Tennessee Medical School, I took a residency training in pediatrics at Johns Hopkins Hospital, and fellowship training in neonatology at the same institution. Thereafter, I performed fellowship training in Pediatric Critical Care Medicine at the Children's National Medical Center in Washington, D.C. I am board certified in neonatology-perinatalogy medicine, pediatrics and pediatric critical care medicine.

3.

In 2001 and at the present time as well I specialized in the practice of pediatric critical care medicine and neonatology.

4.

The nature of my practice and my specialty is non-surgical. I do not perform and have not performed surgery.

5.

The care which I administer to patients in the practice of neonatology does not include surgical procedures, and I do not and am not qualified to

make decisions as to whether a patient should be taken to surgery or when, or under what circumstances surgery is properly performed.

6.

In my opinion, there is no meaningful overlap between the specialty of a pediatric surgeon and a neonatologist. Surgeons do not routinely attend the same continuing medical education as I would attend, and surgeons routinely address other aspects and issues of the practice of medicine than do physicians in my specialty. Surgeons have completely separate residency and training programs. They are credentialed separately by hospitals and typically have separate privileges at hospitals They are credentialed under separate boards.

7.

The within and foregoing statements are made upon my own personal knowledge and are true and correct.

8.

FURTHER AFFIANT SAYETH NOT.

This 18th day of APRIL, 2006.

/s/ William G. Keyes, M.D.
WILLIAM G. KEYES, M.D.

Sworn to and subscribed before me
this 18th day of April, 2006.

/s/ Susan M. Edelman [SEAL]
Notary Public
My commission expires: February 26, 2008

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

TIMOTHY AND ANDREA SPACHT, INDIVIDUALLY AND AS NEXT FRIEND OF N. S., A MINOR, Plaintiffs, v. CHILDREN'S HEALTHCARE OF ATLANTA, INC., DR. WENDY A. TROYER, DR. WILLIAM G. KEYES, DR. JAMES THOMSEN, DR. VERLIA GOWER, DR. THEODORE BRAND AND DR. JOHN BLEACHER, Defendant.	)	CIVIL ACTION FILE NO. 06CV4104-4

AFFIDAVIT OF WENDY A. TROYER, M.D.

STATE OF GEORGIA

COUNTY OF DEKALB:

PERSONALLY APPEARING BEFORE ME, the undersigned attesting officer duly authorized to administer oaths, Wendy A. Troyer, M.D., who, upon oath, deposes and says as follows:

1.

My name is Wendy A. Troyer, M.D. I am an adult, more than 21 years of age, and suffering under no

disability. As such, I am competent to testify to the facts recited herein.

2.

Following graduation from the Medical School at Indiana University, I took residency training in pediatrics at Children's Medical Center, Dayton, Ohio and fellowship training in neonatology at James Whitcomb Riley Hospital for Children, Indiana University. I am board certified in neonatology-perinatal medicine.

3.

In 2001 and at the present time as well I specialized in the practice of neonatology.

4.

The nature of my practice and my specialty is non-surgical. I do not perform and have not performed surgery.

5.

That care which I administered to patients in the context of a neonatology practice does not include surgical procedures, and I do not and am not qualified to make decisions as to whether a patient should be taken to surgery or when or under what circumstances surgery is properly performed.

6.

In my opinion, there is no meaningful overlap between the specialty of a pediatric surgeon and a neonatologist. Surgeons do not routinely attend the same continuing medical education as I would attend and routinely address other aspects and issues of the practice of medicine in my specialty.

7.

The within and foregoing statements are made upon my own personal knowledge and are true and correct.

8.

FURTHER AFFIANT SAYETH NOT.

This 18th day of APRIL, 2006.

/s/ W. Troyer
WENDY A. TROYER, M.D.

Sworn to and subscribed before me
this 18th day of April, 2006.

/s/ Susan M. Edelman [SEAL]
Notary Public
My commission expires: February 26, 2008

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the within and foregoing pleading on opposing counsel by mailing a copy of same in the U.S. Mail properly stamped and addressed to:

Frank J. Klosik, Jr., Esq.
Alina A. Krivitsky, Esq.
Greer, Klosik, Daugherty, Swank & McCune
4651-A Roswell Road
Atlanta, Georgia 30342

This 18 day of April, 2006.

/s/ Robert G. Tanner
Robert G. Tanner
State Bar No. 697650

950 E. Paces Ferry Road
Suite 3000
Atlanta, GA 30326
(404) 876-2700

IN THE SUPERIOR COURT OF DEKALB COUNTY

STATE OF GEORGIA

TIMOTHY AND ANDREA SPACHT, INDIVIDUALLY AND AS NEXT FRIEND OF N.S., A MINOR, Plaintiff, v. CHILDREN'S HEALTHCARE OF ATLANTA, INC., DR. WENDY A. TROYER, DR. WILLIAM G. KEYES, DR. JAMES THOMSEN, DR. VERLIA GOWER, DR. THEODORE BRAND AND DR. JOHN BLEACHER, Defendant.	)	Civil Action No: 06CV4104-4

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS WENDY TROYER AND WILLIAM KEYES' MOTION TO DISMISS

COMES NOW, Timothy and Andrea Spacht, individually and as next friend of N.S., a minor and files this their Response in Opposition to Defendants Wendy Troyer and William Keyes' Motion to Dismiss and shows this Honorable Court as follows:

I. INTRODUCTION

The facts of this case are deceptively simple. Dr. Troyer and Dr. Keyes are Neonatologists. Neonatology is the branch of pediatric medicine concerned with the *diagnosis* and *treatment* of newborns. According to the American Academy of Pediatrics, Neonatologists diagnose newborns with congenital birth defects and coordinate care and medically manage newborns in need of surgery.

On March 12, 2002, Dr. Troyer and Dr. Keyes ordered a CT scan for N.S. The results of the CT scan definitively established that N. suffered from a congenital birth defect known as a vascular ring. Surgical division of a vascular ring is indicated in all symptomatic patients. As Neonatologists, Wendy Troyer and William Keyes should have diagnosed N. with a vascular ring and promptly scheduled surgery for division of the ring. However, Dr. Troyer and Dr. Keyes ignored the CT scan results. The diagnosis was missed and surgical division was not scheduled.

Plaintiffs filed a complaint for medical malpractice against Dr. Troyer and Dr. Keyes based upon their failure to read and act upon the results of the CT scan. Accompanying their Complaint, in accordance with OCGA 9-11-9.1, was the affidavit of Plaintiff's expert, Dr. David Schwartz. See Complaint, Exhibit A. Dr. David Schwartz is a board certified Pediatric Surgeon and Fellow of the American College of Surgeons and American Academy of Pediatrics with over 30 years of experience and knowledge

gained from private practice as a pediatric surgeon and as a professor teaching pediatric surgery at Albert Einstein College of Medicine and New York University Medical Center. See Curriculum Vitae attached as Exhibit "A".

Based upon his knowledge and experience in pediatric medicine, Dr. Schwartz testified that N. suffered many acute and chronic complications because of the failure of Wendy Troyer and William Keyes to make a diagnosis of a vascular ring and their failure to promptly schedule surgical division of the vascular ring on March 12, 2002, when the definitive CT scan results were in hand.

Dr. Troyer and Dr. Keyes do not contest the fact that Dr. Schwartz is an expert in the diagnosis and surgical treatment of vascular rings. Their sole argument is that Dr. Schwartz is not competent to render this opinion under newly amended 24-9-67.1 because he is not a Neonatologist. Defendants' argument is absurd considering that Dr. Schwartz cannot be both an expert in the diagnosis and surgical treatment of neonatal patients with vascular rings and incompetent to testify as an expert on the diagnosis and surgical treatment of neonatal patients with vascular rings simply because he is not a Neonatologist.

Because Dr. Schwartz has experience and knowledge in the area of pediatric medicine dealing with the diagnosis and surgical treatment of newborns, and his opinion is limited to his expertise, he is

competent to give expert testimony, and Defendants' Motion to Dismiss must be denied.

As to Defendants' claim under OCGA 9-11-9.2, it is no longer at issue because the Plaintiffs filed an Amended Complaint with an Authorization.

II. Dr. Schwartz's Testimony More Than Satisfies The Requirements Of O.C.G.A. 24-9-67.1

OCGA 24-9-67.1 governs the admissibility of expert opinions. OCGA 24-9-67.1 states that the expert must have had actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in

(A) The active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; or

(B) The teaching of his or her profession for at least three of the last five years as an employed member of the faculty of an educational institution accredited in the teaching of such profession, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in teaching others

how to perform the procedure, diagnose the condition, or render the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue.

Qualifications

Dr. Schwartz is a board certified Pediatric Surgeon. Pediatric Surgery is defined by the American Board of Surgery Pediatric Surgery Qualification as the diagnostic, preoperative, operative and postoperative surgical management of congenital abnormalities and diseases in the neonatal and pediatric age groups. Thus, Dr. Schwartz is qualified to diagnose and manage by surgical treatment congenital abnormalities in newborns, and based upon over 30 years of experience in private practice as a pediatric surgeon and teaching his profession to medical students, is qualified to render an opinion on the failure to diagnose and schedule surgery for congenital abnormalities.

Dr. Schwartz received his medical school training and degree at Albert Einstein School of Medicine. He performed his internship and surgical residency at Bronx Municipal Hospital Center. He performed his pediatric surgery residency and fellowship at John [sic] Hopkins Hospital. Dr. Schwartz is board certified in pediatric surgery. He has been an assistant clinical professor in surgery at Albert Einstein College of Medicine for over 30 years. He has been a clinical assistant professor at New York University Medical

Center for twenty eight years. He has also been in private practice for pediatric surgery, B.S.K. Pediatric Surgical Associates, P.C. for over thirty years. See Plaintiffs' Complaint Exhibit A, CV attached hereto as Exhibit "A".

Based upon his knowledge and experience in diagnosing birth defects and treating by surgical division conditions affecting pediatric patients, he opined that N. suffered many acute and chronic complications because of the failure of Wendy Troyer and William Keyes to make a correct diagnosis of a vascular ring and promptly schedule surgical division of the ring. Id.

Considering the nature of Dr. Schwartz's work experience as a board certified pediatric surgeon and the teaching of his profession to medical students, he is certainly qualified to render this opinion and the jury is entitled to hear his opinion.

Although Defendants attempt to hide behind the title "Neonatologist" to disqualify plaintiffs' expert, it is the scope of the witness' knowledge and not the artificial classification by title that governs the threshold question of his qualifications. In fact, under long held Georgia law, a physician testifying as an expert witness on the standard of care exercised by another physician is not required to be a specialist in the area of medicine practiced by another physician. *Beatty v. Morgan*, 170 Ga.App. 661, 317 S.E.2d 662 (1984). Construing the statute according to its terms demonstrates that Dr. Schwartz is a competent

witness because his testimony falls within the scope of his practice as a Pediatric Surgeon. Namely, diagnosing newborns with congenital birth defects and treating by surgical repair.

Defendants' argument presumes that the diagnosis and management of a newborn with airway obstruction is exclusively within the professional skills of a Neonatologist and only a Neonatologist would be competent to give an opinion in this field. However, it has been consistently held that members of medical professions are competent to render an opinion about the standard of care of other members of the medical profession as long as their opinion concerns a common area of expertise. *Tye v. Wilson*, 208 Ga.App. 253, 430 S.E.2d 129 (1993).

Acting upon definitive imaging results establishing a vascular ring by making a diagnosis of a vascular ring and scheduling surgery is not exclusively limited to the professional skills of a Neonatologist and there is no evidence that it is so limited. In fact, N. was finally diagnosed with a vascular ring by Dr. Kanter, a pediatric cardio-thoracic surgeon who found the "old CT scan" and then performed surgical division of the vascular ring.

The affidavits of Dr. Keyes and Dr. Troyer are nothing more than thinly veiled attempts to dodge the real issue. The basis of the Plaintiffs' Complaint against them is the failure to diagnose a vascular ring despite having definitive imaging results in hand and the failure to schedule surgery for the vascular

ring when surgical division is indicated in all symptomatic patients. Dr. Schwartz is certainly an expert on the diagnosis and surgical division of vascular rings and is qualified to render an opinion on this issue. Had Defendants read the CT scan, a diagnosis of a vascular ring would have been made and a surgeon such as Dr. Schwartz would have been consulted. The fact that Defendants are not surgeons is not an excuse for their incompetence in failing to diagnose a vascular ring and consult with a surgeon.

In this regard, Defendants provide wholly inconsistent arguments. On one hand, they attempt to absolve themselves of liability by claiming that their practice is non surgical and they are not qualified to make decisions regarding when a patient should be taken in for surgery. Defendants distance themselves from the vascular ring by casting the vascular ring as a surgical problem outside of their area of expertise. On the other hand, the defendants claim that Dr. Schwartz is incompetent to testify as a medical expert because he is a Pediatric Surgeon and not a Neonatologist. Therefore, according to the defendants, the vascular ring is a surgical problem for liability purposes and a Neonatology problem for competency purposes. The subboard of Neonatal Perinatal Medicine examination which defines the knowledge a Neonatologist must demonstrate has been summarized by the certifying board. Specifically, the board states that a Neonatologist must know the clinical features of airway obstruction such as a vascular ring and plan appropriate management. See Subboard of

Neonatal Perinatal Subspecialty Outline attached as Exhibit "B". Clearly, these fields of medicine overlap and a diagnosis of a vascular ring based on definitive CT scan results is the same whether made by a Neonatologist or a Pediatric Surgeon.

The fact is a vascular ring is a congenital birth anomaly that encircles the trachea and esophagus causing breathing problems and digestive difficulties. It is a medical condition that many different specialists must recognize and treat or must recognize and refer for treatment. It is indeed a Neonatology problem and a surgical problem. Dr. Keyes and Dr. Troyer should have recognized the vascular ring and promptly consulted with a Pediatric Surgeon regarding surgical division. As a pediatric surgeon, with knowledge and experience in the diagnosis and treatment of vascular rings in neonatal children, Dr. Schwartz is competent to testify as to the defendants' failure to diagnose and consult with a pediatric surgeon such as himself regarding division of the ring. Complaint Exhibit A.

The Defendants have tapped into the bottom line. There is significant overlap between Neonatology and Pediatric Surgery so as to render Dr. Schwartz competent to testify against Dr. Keyes and Dr. Troyer.

III. Conclusion

Based on the facts and authorities cited above, Plaintiffs respectfully urge the Court to deny Defendants' Motion. The testimony of Dr. Schwartz more than satisfies the requirements of O.C.G.A. 24-9-67.1.

THIS 18th day of May, 2006.

GREER, KLOSIK, DAUGHERTY, SWANK AND MCCUNE

BY: /s/ Alina Krivitsky
FRANK J. KLOSIK, JR.
State Bar No.: 425300
ALINA KRIVITSKY
State Bar No.: 142056
Attorneys for Plaintiffs

4651-A Roswell Road
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EXHIBIT B

American Board of Pediatrics

Subspecialty Certifying Examination

CONTENT OUTLINE

Subboard of

Neonatal-Perinatal Medicine

pulmonary hypertension

Recognize the laboratory, imaging, and other diagnostic features of persistent pulmonary hypertension

Know the management of persistent pulmonary hypertension including assisted ventilation, pharmacologic approaches, and ECMO

D. Other causes of respiratory distress

1. Extrapulmonary (eg, diaphragmatic hernia, cord transection, etc.)

Plan appropriate therapy for an infant with extrapulmonary causes of respiratory distress

Recognize the clinical features of extrapulmonary causes of respiratory distress

Recognize the imaging features of extrapulmonary causes of respiratory distress

2. Airway obstruction (eg, vascular rings, choanal atresia, etc.)

Know the clinical features of an infant with airway obstruction

Plan appropriate management for an infant with airway obstruction

3. Miscellaneous

Recognize the clinical and imaging features of congenital malformations of the lung, including congenital pulmonary lymphangiectasia, the cystic lung diseases, such as congenital lobar emphysema, cystic adenomatoid malformation, and mediastinal tumors

Know the appropriate management for an infant with congenital malformations of the lung, including congenital pulmonary lymphantgiectasia, and the cystic lung diseases, such as congenital lobar emphysema, cystic adenomatoid malformation, and mediastinal tumors

4. Pleural disorders (effusion, chylothorax)

Know the pathophysiology and recognize the clinical, radiographic, and laboratory manifestations of hydrothorax/chylothorax

Plan the therapeutic management of hydrothorax/chylothorax

E. Apnea of prematurity and neonatal respiratory depression

Know the pathophysiology of apnea of prematurity

Know the management of apnea of prematurity

F. Treatment

CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of the within and foregoing pleading by depositing in the United States Mail, properly addressed and with sufficient postage affixed thereto to ensure delivery to the following:

Mr. Robert G. Tanner
Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC
950 East Paces Ferry Road
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Thomas E. Lavender, III
The Weathington Firm
230 Peachtree Street
Suite 2700
Atlanta, GA 30303

Darcy Coty
Greenberg Traurig LLP
The Forum – Suite 400
3290 Northside Parkway
Atlanta, Georgia 30327

H. Andrew Owen
OWEN GLEATON EGAN JONES &
SWEENEY, LLP
1230 Peachtree St., N.E.
Suite 1400, Promenade Two
Atlanta, GA 30309-3574

This 18 day of May, 2006.

GREER, KLOSIK, DAUGHERTY,
SWANK AND MCCUNE

BY: /s/ Alina Krivitsky
ALINA KRIVITSKY
State Bar No.: 142056
Attorney for Plaintiffs

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IN THE SUPERIOR COURT OF DEKALB COUNTY STATE OF GEORGIA

TIMOTHY AND ANDREA SPACHT, INDIVIDUALLY AND AS NEXT FRIEND OF N.S., A MINOR	)	**CIVIL ACTION NO. 06-CV-04104-4**
Plaintiffs,	)	
v.	)	
CHILDREN'S HEALTH-CARE OF ATLANTA, INC., DR. WENDY A. TROYER, DR. WILLIAM G. KEYES, DR. JAMES THOMSEN, DR. VERLIA GOWER, DR. THEODORE BRAND, AND DR. JOHN BLEACHER,	)	
Defendants.	)	

DEFENDANTS DR. JAMES THOMSEN AND DR. VERLIA GOWER'S MOTION TO DISMISS

COME NOW Defendants James Thomsen, M.D. and Verlia Gower, M.D. (collectively "Defendants") and, pursuant to O.C.G.A §§ 9-11-9.1, 9-11-9.2, 9-11-12(b)(6) and 24-9-67.1, hereby move this Court to dismiss Plaintiffs' Complaint against Defendants based on Plaintiffs' failure to attach the affidavit of a qualified expert to their Complaint in accordance with O.C.G.A. § 9-11-9.1 and failure to file a medical authorization as prescribed by O.C.G.A. § 9-11-9.2.

In support of their Motion, Defendants rely upon Plaintiffs' Complaint, the Affidavit of David Schwartz, M.D. attached to Plaintiffs' Complaint and Defendants' Brief in Support of this Motion to Dismiss.

Wherefore, Defendants respectfully request that this Court grant this Motion and dismiss Plaintiffs' Complaint with prejudice.

Respectfully submitted this 15th day of May, 2006.

GREENBERG TRAURIG, LLP

/s/ Darcy Coty
Lori G. Cohen
Georgia Bar No. 174455
Darcy Coty
Georgia Bar No. 259280
Attorneys for Defendants James Thomsen, M.D. and Verlia Gower, M.D.

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IN THE SUPERIOR COURT OF DEKALB COUNTY STATE OF GEORGIA

TIMOTHY AND ANDREA SPACHT, INDIVIDUALLY AND AS NEXT FRIEND OF N.S., A MINOR	)	**CIVIL ACTION NO. 06-CV-04104-4**
Plaintiffs,	)	
v.	)	
CHILDREN'S HEALTH-CARE OF ATLANTA, INC., DR. WENDY A. TROYER, DR. WILLIAM G. KEYES, DR. JAMES THOMSEN, DR. VERLIA GOWER, DR. THEODORE BRAND, AND DR. JOHN BLEACHER,	)	
Defendants.	)	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing DEFENDANTS DR. JAMES THOMSEN AND DR. VERLIA GOWER'S MOTION TO DISMISS upon all parties to this matter by depositing a true copy of same in the U.S. Mail, proper postage prepaid, properly addressed to the following:

Robert Tanner
Weinberg Wheeler
Hudgins Gunn &
Dial, LLC
950 East Paces Ferry
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Atlanta, Georgia 30326

Thomas Lavender
The Weathington
Firm, P.C.
230 Peachtree Street NW,
Suite 2700
Atlanta, Georgia 30303

Frank Klosik, Jr.
Alina Krivitsky
GREER, KLOSIK, DAUGHTERY,
SWANK AND CUNE [sic]
4651-A Roswell Road
Atlanta, Georgia 30342

This 15th day of May, 2006.

By: /s/ Darcy Coty
Darcy Coty

IN THE SUPERIOR COURT OF DEKALB COUNTY STATE OF GEORGIA

TIMOTHY AND ANDREA SPACHT, INDIVIDUALLY AND AS NEXT FRIEND OF N.S., A MINOR	)	**CIVIL ACTION NO. 06-CV-04104-4**
Plaintiffs,	)	
v.	)	
CHILDREN'S HEALTH-CARE OF ATLANTA, INC., DR. WENDY A. TROYER, DR. WILLIAM G. KEYES, DR. JAMES THOMSEN, DR. VERLIA GOWER, DR. THEODORE BRAND, AND DR. JOHN BLEACHER,	)	
Defendants.	)	

DEFENDANTS DR. JAMES THOMSEN AND DR. VERLIA GOWER'S BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS

COME NOW Defendants James Thomsen, M.D. ("Dr. Thomsen") and Verlia Gower, M.D. ("Dr. Gower") (collectively "Defendants") and, pursuant to O.C.G.A §§ 9-11-9.1, 9-11-9.2, 9-11-12(b)(6) and 24-9-67.1, hereby file this Brief in Support of Their Motion to Dismiss, contemporaneously with their Answer and Defenses to Plaintiffs' Complaint. Plaintiffs' Complaint against Defendants should be dismissed in its

entirety because the Affidavit of David L. Schwartz ("Dr. Schwartz") is insufficient pursuant to O.C.G.A. § 9-11-9.1 because, on its face, Dr. Schwarz's Affidavit fails to establish that Dr. Schwartz is qualified or competent to testify regarding the relevant standard of care owed by a pediatric otolaryngologist. Additionally, Plaintiffs' Complaint should [sic] dismissed in its entirety because Plaintiffs failed to file a medical authorization as prescribed by O.C.G.A. § 9-11-9.2.

In support of their Motion to Dismiss, Defendants shows the Court as follows:

STATEMENT OF FACTS

Plaintiffs filed their Complaint in this medical malpractice action on March 24, 2006, alleging, among other things, that Defendants were negligent in the medical care they provided to Plaintiffs' son, N.S. ("N"). More specifically, Plaintiffs allege that Dr. Thomsen "failed to read or act upon the results of the CAT scan which established that N. suffered from a vascular ring, and kept in place an unnecessary tracheotomy, referring to N. as tracheotomy dependent" (Compl. ¶ 17.) Plaintiffs further allege that Dr. Gower performed a "major" and unnecessary submandibular gland excision and parotid duct ligation. *Id.* at ¶ 22. Defendants dispute Plaintiffs' allegations and affirmatively assert that they at all times met or exceeded the relevant standard of care in rendering medical care and treatment to N. *See generally* Defendants Dr. James Thomsen and Dr. Verlia

Gower's Answer and Defenses To Plaintiffs' Complaint.

In conjunction with their Complaint, Plaintiffs filed the Affidavit of Dr. Schwartz, a purported expert.[1] In his Affidavit, Dr. Schwartz states that "[t]he establishment of a surgical traecheostomy would have been avoided if Dr. Thomsen" had recognized the existence of a certain medical condition. (Schwartz Aff. ¶ 2(C).) Dr. Schwartz did not attach a curriculum vitae to his affidavit. Instead, Dr. Schwartz's Affidavit itself provides an abbreviated educational and professional history. (*See* Schwartz Aff. ¶ 4.)

As a matter of law, Dr. Schwartz's Affidavit demonstrates that he is not competent or qualified to render expert testimony against Defendants. Where as Dr. Thomsen is a pediatric otolaryngologist who completed residencies in general surgery and otolaryngology and a fellowship in pediatric otolaryngology, Dr. Schwartz is a general pediatric surgeon. *Id.* Similarly, whereas Dr. Schwartz was trained as and practices as a general pediatric surgeon, Dr. Gower completed a residency in otorhinolaryngology and a fellowship in pediatric otorhinolaryngology.

As pediatric otolaryngologists, Defendants have undergone extremely specialized training in and

---

[1] For the court's convenience, a copy of Dr. Schwartz's affidavit is attached hereto as *Exhibit A* (hereinafter, Schwartz Aff.).

routinely provide medical care to patients with difficult airways and critical larynxes. In contrast, Dr. Schwartz's Affidavit does not reflect any experience in the dedicated field of pediatric otolaryngology, whether through private practice, board certification, teaching, or otherwise. *See generally id.* Accordingly, there is no indication whatsoever that Dr. Schwartz is qualified to assess or otherwise comment on the standard of care applicable to Dr. Defendants – board certified otolargyngologists. Because Dr. Schwartz is not qualified to testify against Defendants, the Court must dismiss Plaintiffs' claims against Defendants in their entirety.

Additionally, Plaintiffs did not file a medical authorization as required by O.C.G.A. § 9-11-9.2, and the Court should therefore dismiss Plaintiffs' Complaint.

ARGUMENT AND CITATION OF AUTHORITY

I. PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED BECAUSE PLAINTIFFS' EXPERT AFFIDAVIT IS DEFECTIVE AS TO DEFENDANTS

The Court should dismiss Plaintiffs' Complaint in its entirety because the Affidavit of Dr. Schwartz filed contemporaneously with Plaintiffs' Complaint fails to comply with O.C.G.A. § 9-11-9.1. Section 9-11-9.1 requires that when a complaint for professional negligence is filed, it must be accompanied by the affidavit "of an expert competent to testify, which

affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim." O.C.G.A. § 9-11-9.1. A complaint that is not accompanied by a legally sufficient expert affidavit will be dismissed. *Id.* Where, as here, the plaintiff files the "defective" affidavit of an unqualified expert with the complaint and a defendant files a motion to dismiss on grounds that the affidavit is legally insufficient the court must dismiss the complaint unless the plaintiff amends and cures with a new affidavit within thirty (30) days of service of the defendant's motion to dismiss. O.C.G.A. § 9-11-9.1(b).

The Georgia legislature has provided detailed instructions regarding the requirements for expert witness competency in medical malpractice cases. *See* O.C.G.A. § 24-9-67.1. Of special relevance to the present case are the requirements that the "expert" be licensed to practice medicine at the time of the alleged events, and that he have "actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given." O.C.G.A. § 24-9-67.1(c)(2) (emphasis added). "Actual professional knowledge" is defined as having *actively* practiced in the area of specialty for "at least three of the last five years, *with sufficient frequency* to establish an appropriate level of knowledge, as determined by the judge, in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue."

O.C.G.A. § 24-9-67.1(c)(2)(A). Alternatively, an affiant may gain "actual professional knowledge and experience in [a particular] area of practice or specialty" by having taught that practice area at accredited institution "for three of the last five years" with sufficient frequency to establish the appropriate level of knowledge." O.C.G.A. § 24-9-67.1(c)(2)(B). These standards apply both to testifying experts and to experts submitting an affidavit pursuant to O.C.G.A. § 9-11-9.1. O.C.G.A. § 24-9-67.1(e).

In the instant case, Plaintiffs have filed the Affidavit of Dr. Schwartz. In order for Dr. Schwartz's Affidavit to be sufficient for the purposes of the Georgia Civil Practice Act, Dr. Schwartz must have "actual professional knowledge" in rendering or teaching the specialized treatment or care at issue in this case – pediatric otolaryngology. Specifically then, Dr. Schwartz must have "actively practiced" as a full-time or almost full-time pediatric otolaryngologist or taught pediatric otolaryngology for at least three of the last five years, with "sufficient frequency to establish an appropriate level of knowledge." O.C.G.A. § 24-9-67.1(c)(2)(A), (B). Significantly, these standards apply both to testifying experts and to experts submitting an affidavit pursuant to O.C.G.A. § 9-11-9.1. O.C.G.A. § 24-9-67.1(e).

On the face of his Affidavit, there is no indication that Dr. Schwartz has *any* professional training or experience in pediatric otolaryngology. *See generally* Schwartz Aff. Instead, Dr. Schwartz's Affidavit recites only that he has practiced as a pediatric surgeon

since 1974 and that he has served as an assistant clinical professor of surgery since 1974. (Schwartz Aff. 4.) Unlike Defendants, Dr. Schwartz's Affidavit indicates that he has never practiced as a pediatric otolaryngologist, let alone done so for three of the past five years which is required by the statute, such that his Affidavit fails to establish sufficient professional knowledge to assess any procedure, treatment, or diagnosis rendered by Defendants, board certified otolaryngologists.

Pediatric otolaryngology is a highly specialized area of medicine that requires particular education, training, knowledge, and experience. Because Dr. Schwartz's Affidavit fails to establish that Dr. Schwartz has been actively engaged in teaching or practicing this specialty, Dr. Schwartz is not competent to testify to the standard of care applicable to pediatric otolaryngologists. Accordingly, the Affidavit of Dr. Schwartz does not comport with the requirement of O.C.G.A. § 9-11-9.1, and the Court must therefore dismiss Plaintiffs' claims against Defendants.

II. PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED BECAUSE PLAINTIFF FAILED TO FILE A MEDICAL AUTHORIZATION AS REQUIRED BY O.C.G.A. § 9-11-9.2

Plaintiffs' Complaint should be dismissed in its entirety because Plaintiffs failed to file the required medical authorization in accordance with O.C.G.A. § 9-11-9.2. In pertinent part, O.C.G.A. § 9-11-9.2 states that in any action for damages alleging medical malpractice against a doctor or hospital, "contemporaneously with the filing of the Complaint, the plaintiff shall be required to file a medical authorization form. Failure to file this authorization shall subject the complaint to dismissal."

In the instant case, Plaintiffs have failed to file a medical authorization in accordance with O.C.G.A, § 9-11-9.2, and their Complaint should, therefore, be dismissed.

CONCLUSION

Plaintiffs have failed to comply with the requirements of O.C.G.A. § 9-11-9.1 and 9-11-9.2, and Defendants respectfully request that the Court dismiss Plaintiffs' claims against them for the reasons set forth more fully above.

Respectfully submitted this 15th day of May, 2006.

GREENBERG TRAURIG, LLP

/s/ Darcy Coty

Lori G. Cohen
Georgia Bar No. 174455
Darcy Coty
Georgia Bar No. 259280
Attorneys for Defendants James Thomsen, M.D. and Verlia Gower, M.D.

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IN THE SUPERIOR COURT OF DEKALB COUNTY STATE OF GEORGIA

TIMOTHY AND ANDREA SPACHT, INDIVIDUALLY AND AS NEXT FRIEND OF N.S., A MINOR	)	**CIVIL ACTION NO. 06-CV-04104-4**
Plaintiffs,	)	
v.	)	
CHILDREN'S HEALTH-CARE OF ATLANTA, INC., DR. WENDY A. TROYER, DR. WILLIAM G. KEYES, DR. JAMES THOMSEN, DR. VERLIA GOWER, DR. THEODORE BRAND, AND DR. JOHN BLEACHER,	)	
Defendants.	)	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing DEFENDANTS DR. JAMES THOMSEN AND DR. VERLIA GOWER'S BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS upon all parties to this matter by depositing a true copy of same in the U.S. Mail, proper postage prepaid, properly addressed to the following:

Robert Tanner
Weinberg Wheeler
Hudgins Gunn &
Dial, LLC
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Road, Ste 3000
Atlanta, Georgia 30326

Thomas Lavender
The Weathington
Firm, P.C.
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Atlanta, Georgia 30303

Frank Klosik, Jr.
Alina Krivitsky
GREER, KLOSIK, DAUGHTERY,
SWANK AND CUNE [sic]
4651-A Roswell Road
Atlanta, Georgia 30342

This 15th day of May, 2006.

By: /s/ Darcy Coty
Darcy Coty

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

TIMOTHY AND ANDREA SPACHT, INDIVIDUALLY AND AS NEXT FRIEND OF N. S., A MINOR, Plaintiff,	)	
v.	)	
CHILDREN'S HEALTHCARE OF ATLANTA, INC., DR. WENDY A. TROYER, DR. WILLIAM G. KEYES, DR. JAMES THOMSEN, DR. VERLIA GOWER, DR. THEODORE BRAND AND DR. JOHN BLEACHER, Defendant.	)	Civil Action No: 06CV4104-4

PLAINTIFFS BRIEF IN SUPPORT OF THEIR RESPONSE IN OPPOSITION TO DEFENDANTS DR. JAMES THOMSEN AND DR. VERLIA GOWER'S MOTION TO DISMISS

COMES NOW, Timothy and Andrea Spacht, individually and as next friend of N. S., a minor and files this their Brief in Support of Response in Opposition to Defendants James Thomsen and Verlia Gower's Motion to Dismiss and shows this Honorable Court as follows:

I. INTRODUCTION

Plaintiffs filed the instant action on March 24, 2006. Accompanying their Complaint, in accordance with the provisions of OCGA § 9-11-9.1, was the affidavit of Plaintiff's expert, Dr. David Schwartz. See Complaint, Affidavit attached hereto as Exhibit A. Dr. Schwartz's affidavit shows that he can opine as to whether malpractice existed. He testified that he is a Board Certified Pediatric Surgeon and Fellow of the American College of Surgeons and American Academy of Pediatrics; that he has practiced pediatric surgery for 32 years; and that he has been a clinical assistant professor at Albert Einstein College of Medicine and New York University Medical Center for 28 years. See also Curriculum Vitae attached as Exhibit "B."

Based upon his knowledge and experience as a pediatric surgeon, and his review of certified medical records from Children's Healthcare of Atlanta concerning the treatment of N. S., Dr. Schwartz testified that Dr. Thomsen and Dr. Gower failed to recognize that N. S. suffered from a vascular ring. He states that the establishment of a surgical tracheotomy would have been avoided if Dr. Thomsen recognized that N.s' presentation was a consequence of his vascular ring.

He states that if Dr. Gower had reviewed the history, and all radiology reports prior to performing the bilateral mandibular gland excision and bilateral parotid duct ligations, including review of the March

12, 2002 CT scan report establishing that N. suffered from a vascular ring, she could have seen that N. had a vascular ring, and she could have avoided this procedure and all of the negative side effects that are associated with this procedure.

Dr. Schwartz does not testify to the manner in which the tracheotomy was established or the salivary glands removed. He states that these procedures were unnecessary and would have been avoided if Defendants recognized that N. had a vascular ring. With over 30 years of experience in private practice and as a professor, Dr. Schwartz is certainly qualified to recognize the presentation of a vascular ring and all of the symptoms associated with a vascular ring; he is qualified to perform a surgical division of the vascular ring, and he is certainly competent to testify that the failure to recognize a vascular ring is a violation of professional standards.

That Dr. Schwartz is competent to testify to the standard of care applicable to pediatric patients presenting with a vascular ring is not challenged by Defendants. Their sole argument is that Dr. Schwartz is not competent to render an opinion against Dr. Gower and Dr. Thomsen because he is not a Pediatric Otolaryngologist. According to the Defendants, a plaintiff alleging malpractice against a Pediatric Otolaryngologist can only meet the requirements of OCGA 9-11-9.1 by submitting the affidavit of a Pediatric Otolaryngologist, no matter what acts of negligence are alleged. This is simply not the law. The law states that members of the medical profession are

competent to render an opinion about the standard of care of other members of the medical profession as long as their opinion concerns a common area of expertise.

As pertinent here, recognizing that a patient's presentation is the result of a vascular ring and reviewing a patient's history are not matters exclusively within the professional skills of a Pediatric Otolaryngologist. Dr. Schwartz's expertise as a Pediatric Surgeon encompasses the standard of care applicable to the performance of these matters because he is qualified to diagnose and treat a vascular ring, and is certainly competent to testify that reviewing a patient's history is a duty owed a patient, and the failure to so is the result of a breach of that duty.

Furthermore, Defendants' claims under OCGA § 9-11-9.2 are no longer an issue because the Plaintiffs amended their Complaint to file a medical authorization as prescribed by OCGA § 9-11-9.2.

Consequently, the Defendants' Motion to Dismiss must be denied because the Plaintiffs' expert, Dr. Schwartz is competent and qualified to render expert testimony as to the acts and omissions of these Defendants, and Plaintiffs filed a medical authorization as prescribed by OCGA § 9-11-9.2.

II. ARGUMENT AND CITATION OF AUTHORITY

The purpose of OCGA § 9-11-9.1 is to reduce the number of frivolous malpractice suits being filed, not to require a plaintiff to prove a prima facie case entitling him to recover and capable of withstanding a motion for summary judgment before the defendant need file his answer. *Lee v. Visiting Nurse Heath System of Metropolitan Atlanta, Inc.*, 223 Ga.App. 305, 477 S.E.2d 445 (1996). For a complaint to be subject to dismissal for failure to state a claim, the affidavit must disclose with certainty that the plaintiff would not be entitled to relief under any state of provable facts. Id. A Section 9-11-9.1 affidavit should be construed most favorably to the plaintiff and all doubts resolved in plaintiff's favor, even if an unfavorable construction of the affidavit may be possible, so long as such construction does not detract from the purpose of § 9-11-9.1 of reducing the number of frivolous malpractice suits. Id. This rule is to be applied to questions of the affiant's competence. Id.

1. Dr. Schwartz's affidavit is sufficient under OCGA § 9-11-9.1 because his testimony concerns a common area of expertise

Dr. Schwartz's affidavit shows that he can opine whether malpractice existed. He testified that he has practiced pediatric surgery for over thirty years and has extensive experience in pediatric surgery; and that he makes his affidavit based upon his experience

in pediatric surgery, both in private practice and as a professor. Based upon his knowledge and experience in pediatric surgery, and his review of the certified medical records from Children's Healthcare of Atlanta, he testified that Dr. Gower should have reviewed the patient's history, including all radiology reports prior to performing the bilateral mandibular gland excision and bilateral parotid duct ligations. If she had reviewed the March 12, 2002 CAT scan report, she would have seen that N. suffered from a vascular ring and she could have avoided this procedure and all of the negative side effects that are associated with this procedure.

Dr. Schwartz further testified that the establishment of a surgical tracheotomy would have been avoided if Dr. Thomsen recognized that N.'s presentation was a consequence of his vascular ring.

Dr. Schwartz's testimony against these defendants is that (1) the failure to recognize that a patient's presentation is the result of a vascular ring is a violation of professional standards (2) the failure to review a patient's history is a violation of professional standards. Because Dr. Schwartz has knowledge and experience in recognizing that a patient's presentation is the result of a vascular ring and reviewing a patient's history, he is certainly qualified and competent to render this opinion. *Lee v. Visiting Nurse Health System of Metropolitan Atlanta, Inc.*, 223 Ga.App. 305, 477 S.E.2d 445 (1996).

When the subject matter to which the plaintiff's expert testifies is not a matter exclusively within the professional skills of the defendant, and there is no evidence that only the defendant is qualified to render the treatment at issue, it cannot be presumed that only a professional within the same specialty as the defendant would be competent to give an expert opinion or testimony in the area. *Tye v. Wilson*, 208 Ga.App. 253, 430 S.E.2d 129 (1993). The plaintiff's expert is a pediatric surgeon and presumably has the education, training, and experience normally possessed by a pediatric surgeon. There is nothing to suggest that a pediatric otolaryngologist has the expertise to recognize a vascular ring or review a patient's history, whereas a pediatric surgeon does not. As such, the plaintiff's expert is competent and qualified to render an opinion in this area. Id.

2. Dr. Schwartz's Testimony More Than Satisfies The Requirements Of O.C.G.A. 24-9-67.1

OCGA 24-9-67.1 governs the admissibility of expert opinions. OCGA 24-9-67.1 states that the expert must have had actual professional knowledge and experience *in the area of practice or specialty in which the opinion is to be given* as the result of having been regularly engaged in

(A) The active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient frequency to establish an

appropriate level of knowledge, as determined by the judge, in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; or

(B) The teaching of his or her profession for at least three of the last five years as an employed member of the faculty of an educational institution accredited in the teaching of such profession, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in teaching others how to perform the procedure, diagnose the condition, or render the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue.

Qualifications

Dr. Schwartz is a board certified Pediatric Surgeon. Pediatric Surgery is defined by the American Board of Surgery Pediatric Surgery Qualification as the diagnostic, preoperative, operative and postoperative surgical management of congenital abnormalities and diseases in the neonatal and pediatric age groups. Thus, Dr. Schwartz is qualified to diagnose and manage by surgical treatment congenital abnormalities in newborns, and based upon over 30 years of experience in private practice as a pediatric surgeon and teaching his profession to medical students, is qualified to render an opinion on the failure to diagnose such abnormality and the failure to review a

patient's history establishing that the patient suffers from said abnormality.

Dr. Schwartz received his medical school training and degree at Albert Einstein School of Medicine. He performed his internship and surgical residency at Bronx Municipal Hospital Center. He performed his pediatric surgery residency and fellowship at John Hopkins Hospital. Dr. Schwartz is board certified in pediatric surgery. He has been an assistant clinical professor in surgery at Albert Einstein College of Medicine for over 30 years. He has been a clinical assistant professor at New York University Medical Center for twenty eight years. He has also been in private practice for pediatric surgery, B.S.K. Pediatric Surgical Associates, P.C. for over thirty years. See CV.

Based upon his knowledge and experience in diagnosing birth defects and treating by surgical division conditions affecting pediatric patients, he opined that N. suffered many acute and chronic complications because of the failure of James Thomsen to make a correct diagnosis of a vascular ring and the failure of Verlia Gower to review the patient's history establishing that the patient had a vascular ring.

Considering the nature of Dr. Schwartz's work experience as a board certified pediatric surgeon and the teaching of his profession to medical students, he is certainly qualified to render this opinion and the jury is entitled to hear his opinion.

Although Defendants attempt to hide behind the title "Pediatric Otolaryngologist" to disqualify plaintiffs' expert, it is the scope of the witness' knowledge

and not the artificial classification by title that governs the threshold question of his qualifications. In fact, under long held Georgia law, a physician testifying as an expert witness on the standard of care exercised by another physician is not required to be a specialist in the area of medicine practiced by another physician. *Beatty v. Morgan*, 170 Ga.App. 661, 317 S.E.2d 662 (1984). Construing the statute according to its terms demonstrates that Dr. Schwartz is a competent witness because his testimony falls within the scope of his practice as a Pediatric Surgeon. Namely, recognizing the presentation of a vascular ring and reviewing the history establishing that the patient has a vascular ring.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request that the Court deny Defendants' Motion to Dismiss for the reasons set forth more fully above.

THIS 26 day of June, 2006.

GREER, KLOSIK, DAUGHERTY, SWANK AND MCCUNE

BY: /s/ Alina Krivitsky
JOHN F. DAUGHERTY
State Bar No.: 205850
ALINA KRIVITSKY
State Bar No.: 142056
Attorneys for Plaintiffs

4651-A Roswell Road
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(404) 252-2020

CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of the within and foregoing pleading by depositing in the United States Mail, properly addressed and with sufficient postage affixed thereto to ensure delivery to the following:

Robert G. Tanner
Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC
950 East Paces Ferry Road
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Thomas E. Lavender, III
The Weathington Firm
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OWEN GLEATON EGAN JONES & SWEENEY, LLP
1230 Peachtree St., N.E.
Suite 1400, Promenade Two
Atlanta, GA 30309-3574

This 26 day of June, 2006.

GREER, KLOSIK, DAUGHERTY,
SWANK AND MCCUNE

BY: /s/ Alina Krivitsky
ALINA KRIVITSKY
State Bar No.: 142056
Attorneys for Plaintiffs

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IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

TIMOTHY AND ANDREA SPACHT, INDIVIDUALLY AND AS NEXT FRIEND OF N.S., A MINOR, Plaintiff, v. CHILDREN'S HEALTHCARE OF ATLANTA, INC., DR. WENDY A. TROYER, DR. WILLIAM G. KEYES, DR. JAMES THOMSEN, DR. VERLIA GOWER, DR. THEODORE BRAND, AND DR. JOHN BLEACHER, Defendant.	Civil Action No. 06-CV-04104-4

MOTION TO SUPPLEMENT AFFIDAVIT

COMES NOW TIMOTHY AND ANDREA SPACHT, INDIVIDUALLY AND AS NEXT FRIEND OF N.S., A MINOR, Plaintiffs in the above captioned case, and files this their Motion to Supplement Affidavit showing this Court as follows:

When an expert's affidavit is filed contemporaneously with the Complaint, a plaintiff is allowed to supplement the affidavit if its sufficiency is challenged. *Lennen v. Dept. of Transportation,* 239 Ga.App. 729, 521 S.E.2d 885 (1999). In this case, the sufficiency of

plaintiff's expert's affidavit has been challenged by Defendants Troyer, Keyes, Thomsen, and Gower. Defendants allege that plaintiff's expert, Dr. Schwartz is not competent to testify because he does not have the same specialty as the physicians he is testifying against. Specifically, Dr. Schwartz is a Board Certified Pediatric Cardiologist. Defendants Troyer and Keyes allege that he cannot testify against them because they are Neonatologists. Defendants Thomsen and Gower allege that he cannot testify as against them because they are Pediatric Otolaryngologists. The Defendants cite to O.C.G.A. § 24-9-67.1 claiming that the newly amended statute requires the expert to have the same specialty as the physician he testifies against.

This is simply not the law. In *Cotten v. Phillips*, 2006 WL 1843634 (Ga.App.), the Court of Appeals held that O.C.G.A. § 24-9-67.1 did not require an expert to have the same specialty as the physician he testified against. The Court found that the language of the statute providing that an expert witness testifying in a medical malpractice action must have "actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given" did not apply to preclude testimony of a medical expert whose specialty was different that [sic] the physician he testified against. *Id.* Instead, the Court concluded that an expert must have knowledge and experience in the area of practice or specialty about which he is providing testimony. The Court found that a medical doctor belonging to Specialty A

can render an opinion about the acts or omissions of another doctor belonging to Specialty B so long as the opinion of the expert witness belonging to Specialty A pertains to Specialty A.

In the instant case, Dr. Schwartz, a Board Certified Pediatric Surgeon, gives an opinion on the vascular ring issues involved herein. In his Supplemental Affidavit attached hereto as Exhibit "A," Dr. Schwartz testified that as a Board Certified Pediatric Surgeon, he has the training, knowledge, and experience to diagnose and surgically manage children with vascular rings, which is the medical condition at issue in this case. Dr. Schwartz further opined that based upon over 30 years of experience in diagnosing and surgically managing children with vascular rings, Dr. Troyer, Dr. Keyes, Dr. Gower and Dr. Thomsen failed to exercise that degree of skill and care ordinarily required by the medical profession in general under like conditions and similar circumstances. He identified the following specific acts or omissions in support of this opinion:

(1) The failure of Wendy Troyer and William Keyes to diagnose and refer N. to a surgeon for evaluation of his vascular ring based upon his March 12, 2002 CAT scan, which definitively established that N.S. suffered from a vascular ring, of which he had the most common type, a right aortic arch with aberrant left subclavian. Vascular rings are life threatening conditions which must be immediately diagnosed and evaluated. It is my

opinion that there is absolutely no reason why this should not have been done when symptomology was clear and definitive imaging results were in hand.

(2) Dr. Gower unnecessary performed a bilateral submandibular gland excision and bilateral parotid duct ligation that could have been avoided. Surgical division of the vascular ring would have fixed the root cause of the problem by alleviating the compression on his esophagus, thus allowing N. to swallow correctly. Dr. Gower should have reviewed the history, including all radiology reports prior to performing the bilateral mandibular gland excision and bilateral parotid duct ligations. If she had reviewed the March 12, 2002 CAT scan report, she would have seen that N. suffered from a vascular ring and she could have avoided this procedure and all of the negative side effects that are associated with this procedure.

(3) Dr. Thomsen kept in place an unnecessary tracheostomy. The establishment of a surgical tracheostomy would have been avoided if Dr. Thomsen recognized that N.'s presentation was a consequence of his vascular ring.

Dr. Schwartz further opined that in order to have treated and cared for N.S. properly under these conditions, the standard of care required of Dr.

Troyer, Dr. Keyes, Dr. Thomsen and Dr. Gower was as follows:

(1) The doctors should have promptly diagnosed N. with a vascular ring and immediately referred him to a surgeon for evaluation of his vascular ring for surgical division

(2) The doctors should have read and acted upon the definitive results of the CAT scan taken on March 12, 2002 which established that N. had a vascular ring

(3) The doctors should have diagnosed N. with a vascular ring and made the connection that N.'s airway problems were caused by the vascular ring. The establishment of a tracheostomy, numerous bronchoscopies and endoscopies and the bilateral mandibular gland excision and bilateral parotid duct ligations as well as the nissen fundoplication and g tube would have been avoided.

Clearly, the area of practice in which the opinion is to be given is pediatric surgery, which is Dr. Schwartz's specialty and Dr. Schwartz is qualified to give an opinion in this area.

WHEREFORE, Plaintiffs respectfully request that the Court deny Defendants' Motions to Dismiss.

THIS 18 day of September, 2006.

GREER, KLOSIK, DAUGHERTY,
SWANK AND MCCUNE

BY: /s/ John F. Daugherty
JOHN F. DAUGHERTY
State Bar No.: 205850
ALINA KRIVITSKY
State Bar No.: 142056
Attorneys for Plaintiffs

4651-A Roswell Road
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(404) 252-2020

CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of the within and foregoing pleading by depositing in the United States Mail, properly addressed and with sufficient postage affixed thereto to ensure delivery to the following:

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H. Andrew Owen
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JONES & SWEENEY, LLP
1230 Peachtree St., N.E.
Suite 1400, Promenade Two
Atlanta, GA 30309-3574

This 18 day of Sept., 2006.

GREER, KLOSIK, DAUGHERTY,
SWANK AND MCCUNE

BY: /s/ Alina Krivitsky
ALINA KRIVITSKY
State Bar No.: 142056
Attorney for Plaintiffs

4651-A Roswell Road
Atlanta, GA 30342
(404) 252-2020

PLAINTIFF'S EXHIBIT A

AFFIDAVIT OF DAVID L. SCHWARTZ, M.D., F.A.C.S., F.A.A.P.

STATE OF NEW YORK
COUNTY OF _____

BEFORE ME, the undersigned officer duly authorized to administer oaths, came David L. Schwartz MD., F.A.C.S., F.A.A.P., who after being duly sworn, states the following;

1.

My name is David L. Schwartz, and I make this supplemental affidavit based on my knowledge, training, and experience as a skilled board certified pediatric surgeon. As a Pediatric surgeon, I operate on children whose development ranges from the newborn stage through the teenage years. I am primarily concerned with the diagnosis, preoperative, operative, and postoperative management of surgical problems in children.

2.

As a board certified Pediatric Surgeon, I have the training, knowledge and experience to diagnose and surgically manage children with vascular rings, which is the medical condition at issue in this case. My knowledge and experience in diagnosing and surgically managing children with vascular rings was gained from my extensive medical training and

experience. I gained my medical school training and degree at Albert Einstein School of Medicine. I performed my internship and surgical residency 1964-1970 at Bronx Municipal Hospital Center. I performed my pediatric surgery residency and fellowship 1972-1974 at John Hopkins Hospital. I am board certified in pediatric surgery. I am an assistant clinical professor in surgery at Albert Einstein College of Medicine, 1974-present, I am a clinical assistant professor at New York University Medical Center, 1978-present, I am in private practice for pediatric surgery, B.S.K. Pediatric Surgical Associates, P.C., 1974-present.

3.

Every day I cooperate with all of the specialists involved in a child's medical care to determine whether surgery is the best option for the child. I regularly cooperate with neonatologists and pediatric otolaryngologists to manage surgical problems in children. A child with a vascular ring must be diagnosed immediately by neonatologists and/or pediatric otolaryngologists and then they must refer the child to a pediatric surgeon so that the pediatric surgeon may immediately evaluate the child for surgical division of the vascular ring.

4.

Based upon over thirty years of experience in diagnosing and surgically managing children with

vascular rings and upon a review of the certified medical records from Children's Healthcare of Atlanta which reflects the treatment that Dr. Troyer, Dr. Keyes, Dr. Gower, and Dr. Thomsen gave to N.S., it is my opinion that Dr. Troyer, Dr. Keyes, Dr. Gower and Dr. Thomsen failed to exercise that degree of skill and care ordinarily required by the medical profession in general under like conditions and similar circumstances. I have identified the following specific acts or omissions in support of his opinion:

(1) The failure of Wendy Troyer and William Keyes to diagnose and refer N. to a surgeon for evaluation of his vascular ring based upon his March 12, 2002 CAT scan, which definitively established that N.S. suffered from a vascular ring, of which he had the most common type, a right aortic arch with aberrant left subclavian. Vascular rings are life threatening conditions which must be immediately diagnosed and evaluated. It is my opinion that there is absolutely no reason why this should not have been done when symptomology was clear and definitive imaging results were in hand.

(2) Dr. Gower unnecessary performed a bilateral submandibular gland excision and bilateral parotid duct ligation that could have been avoided. Surgical division of the vascular ring would have fixed the root cause of the problem by alleviating the compression on his esophagus, thus allowing N. to swallow

correctly. Dr. Gower should have reviewed the history, including all radiology reports prior to performing the bilateral mandibular gland excision and bilateral parotid duct ligations. If she had reviewed the March 12, 2002 CAT scan report, she would have seen that N. suffered from a vascular ring and she could have avoided this procedure and all of the negative side effects that are associated with this procedure.

(3) Dr. Thomsen kept in place an unnecessary tracheostomy. The establishment of a surgical tracheostomy would have been avoided if Dr. Thomsen recognized that N.'s presentation was a consequence of his vascular ring.

5.

In order to have treated and cared for N.S. properly under these conditions, the standard of care required of Dr. Troyer, Dr. Keyes, Dr. Thomsen and Dr. Gower was as follows:

(1) The doctors should have promptly diagnosed N. with a vascular ring and immediately referred him to a surgeon or evaluation of his vascular ring for surgical division

(2) The doctors should have read and acted upon the definitive results of the CT scan taken on March 12, 2002 which established that N. had a vascular ring.

(3) The doctors should have diagnosed N. with a vascular ring and made the connection that N.'s airway problems were caused by the vascular ring. The establishment of a tracheostomy, numerous bronchoscopies and endoscopies and the bilateral mandibular gland excision and bilateral parotid duct ligations as well as the nissen fundoplication and g tube would have been avoided.

I make this affidavit under oath, after having been duly sworn on the basis of my training and medical experience as applied to a review of the records listed above. This affidavit is executed for the purpose of being attached to and used in support of the Plaintiffs' medical malpractice complaint as required by O.C.G.A. § 9-11-9.1.

/s/ David L. Schwartz, M.D.
David L. Schwartz,

Sworn to and subscribed
before me this 11th day of
Sept., 2006.

/s/ Diane Chagoll
NOTARY PUBLIC

DIANE CHAGOLL
NOTARY PUBLIC,
State of New York
No. 01CH4718947
Qualified in Nassau County
Commission Expires
February 28, 2007

IN THE SUPERIOR COURT FOR THE
COUNTY OF DEKALB STATE OF GEORGIA

TIMOTHY AND ANDREA SPACHT, INDIVIDUALLY AND AS NEXT FRIEND OF N.S., A MINOR CHILD,	)	
PLAINTIFFS,	)	FILE NO.: 06-CV-4104-4
VS.	)	
CHILDREN'S HEALTHCARE OF ATLANTA, INC., ET AL.,	)	
DEFENDANTS.	)	

TRANSCRIPT OF MOTIONS HEARING IN THE ABOVE-CAPTIONED MATTER BEFORE THE HONORABLE JOAN F. ROACH, SUPERIOR COURT, DIVISION 4, HELD ON SEPTEMBER 21, 2006, DECATUR, GEORGIA

APPEARANCES OF COUNSEL:

FOR THE PLAINTIFFS:

JOHN F. DAUGHERTY, ESQ.
ALINA A. KRIVITSKY, ESQ.

FOR DEFENDANTS KEYES AND TROYER:

ROBERT G. TANNER, ESQ.

FOR DEFENDANTS GOWER AND THOMSEN:

DARCY E. COTY, ESQ.

FOR DEFENDANT CHILDREN'S HEALTHCARE OF ATLANTA:

THOMAS E. LAVENDER III, ESQ.

DIANNE KARAMPELAS
CERTIFIED COURT REPORTER
DEKALB COUNTY COURTHOUSE
DECATUR, GEORGIA 30030

[2] **PROCEEDINGS**

THE COURT: GOOD MORNING, LADIES AND GENTLEMEN. I'M JUDGE ROACH. I'M HERE FOR JUDGE FLAKE THIS MORNING, AND I ALWAYS LIKE TO BEGIN BY THANKING JUDGE FLAKE AND HER STAFF FOR THEIR ASSISTANCE.

THIS IS A MATTER SPECIALLY SET BY JUDGE FLAKE ON A HEARING ON A MOTION TO DISMISS TO DETERMINE A LIMITED ISSUE.

ARE THE PLAINTIFFS READY TO PROCEED?

MR. DAUGHERTY: YES, MA'AM. JUDGE, THERE'S A CASE CAME OUT JUST YESTERDAY, AND I THINK IT'S DISPOSITIVE OF WHAT WE'RE HERE ABOUT. IT JUST CAME OUT BY THE COURT OF APPEALS YESTERDAY. MAY I APPROACH AND GIVE YOU THE CASE?

THE COURT: WHY DON'T I LET YOU ARGUE WHAT IT SAYS –

MR. DAUGHERTY: I WILL. WE WERE GOING TO, BUT I WAS GOING TO GIVE YOU ONE WHERE YOU KNOW WHAT I'M ARGUING WAS WHAT WAS IN THE CASE.

THE COURT: I'LL LET YOU ARGUE IT, COUNSEL, AND YOU ARE?

MR. DAUGHERTY: MY NAME IS JOHN DAUGHERTY. ME AND MS. KRIVITSKY, WE REPRESENT THE PLAINTIFFS IN THE CASE.

THE COURT: ALL RIGHT. HAVE YOU PROVIDED THE CASE TO OPPOSING COUNSEL?

MR. DAUGHERTY: I'LL LET THEM READ THEM. IT JUST CAME OUT YESTERDAY. WE GOT IT OFF THE INTERNET TODAY WHEN [3] WE CAME. THEY HAVE HAD A CHANCE TO LOOK AT IT, BUT IT'S BASICALLY EXACTLY ON POINT WHAT WE'RE HERE ABOUT.

THE COURT: IF YOU ARE READY TO PROCEED, I'LL HEAR YOUR ARGUMENT, THEN, ON THE CASE.

MR. DAUGHERTY: IT'S THEIR MOTION.

MR. TANNER: DOES YOUR HONOR HAVE A PREFERENCE ABOUT WHERE WE STAND?

THE COURT: WHEREVER YOU'RE MORE COMFORTABLE, AS LONG AS THE COURT REPORTER CAN SEE AND HEAR YOU IS FINE.

MR. TANNER: FIRST OFF, LET ME INTRODUCE MYSELF. MY NAME IS BOB TANNER. I REPRESENT, IN THIS CASE, TWO NEONATOLOGISTS, DR. KEYES AND DR. TROYER.

AS THE COURT HAS OBSERVED, THIS IS A LIMITED ISSUE, AND IT ARISES IN THE CONTEXT OF A MOTION TO DISMISS. A LONG TIME AGO, I LEARNED FROM JOEL PRYOR THAT ONE OF THE FIRST THINGS YOU OUGHT TO DO WHEN YOU STAND TO ADDRESS THE COURT IS PARTICULARIZE WHAT IT IS YOU ARE DOING AND WHAT YOU WANT THE COURT TO DO ABOUT IT.

THIS MOTION IS TO DISMISS ON BEHALF OF DR. KEYES AND TROYER, AND WE'RE ASKING THE COURT FOR THAT RELIEF, AND WE'RE ASKING ON THE SIMPLE BASIS THAT THE PLAINTIFF HAS NOT PROVIDED THE KIND OF AFFIDAVIT THAT WE FEEL THE LAW REQUIRES THAT THEY PRODUCE WHEN FILING A MEDICAL MALPRACTICE ACTION.

THE WHOLE QUESTION COMES DOWN TO THE AFFIDAVIT OF THE [4] EXPERT AND HIS EXPERTISE, AND IT BASICALLY INVOLVES THE ANALYSIS OF TWO STATUTES. THIS, OBVIOUSLY, IS A MEDICAL MALPRACTICE CASE. I DON'T THINK THERE'S ANY QUESTION ABOUT

THAT. THE PLAINTIFF FILED AN AFFIDAVIT WITH THE COMPLAINT BY A PEDIATRIC SURGEON NAMED DR. SCHWARTZ, AND THE QUESTION IS DID DR. SCHWARTZ HAVE THE NECESSARY EXPERTISE TO ALLOW HIM TO GIVE THAT AFFIDAVIT AGAINST, IN MY CASE, NEONATOLOGISTS. THERE ARE OTHER FOLKS WHO WILL TALK ABOUT THEIR SPECIALTIES. DR. SCHWARTZ WAS THE ONLY PHYSICIAN TO GIVE AN AFFIDAVIT ON BEHALF OF THE PLAINTIFF.

BECAUSE THE CASE INVOLVES THE CONSTRUCTION, I THINK, OF TWO STATUTES, I'VE MADE COPIES OF THESE TWO STATUTES AND HIGHLIGHTED WHAT I THINK ARE THE PERTINENT PORTIONS, AND I'LL BE HAPPY TO SAY TO THE COURT – HAND YOU COPIES OF THE TWO STATUTES, IF THAT WOULD BE OF ANY HELP OR –

THE COURT: I ACTUALLY HAVE COPIES OF THE STATUTES, AND JUST SO BOTH SIDES KNOW, I'VE READ MOST OF THE FILE, NOT ALL OF THE FILE, BECAUSE I BELIEVE SOME DEPOSITIONS WERE FILED EARLIER, AND I'VE READ THE COURT'S ORDER ON THIS, SO I GENERALLY DO HAVE SOME BACKGROUND AS RELATES TO THE FILE.

MR. TANNER: GREAT. LET ME BE A GOOD STEWARD OF THE COURT'S TIME AND TURN DIRECTLY TO MY ARGUMENT. YOUR

HONOR, I WOULD BEGIN WITH 9-11-9.1, THE STATUTE THAT REQUIRES, AND I'M QUOTING HERE, THAT WHEN A MALPRACTICE [5] CASE IS FILED THE PLAINTIFF MUST FILE, QUOTE, AN AFFIDAVIT OF AN EXPERT COMPETENT TO TESTIFY, WHICH AFFIDAVIT SHALL SET FORTH SPECIFICALLY AT LEAST ONE NEGLIGENT ACT OR OMISSION CLAIMED TO EXIST, END QUOTE.

NOW, THERE ARE MANY THINGS THAT AN EXPERT MAY TESTIFY ABOUT IN A MALPRACTICE CASE. AN EXPERT MIGHT TESTIFY ABOUT CAUSATION, MIGHT TESTIFY ABOUT LIFE EXPECTANCY, BUT THOSE DON'T HAVE TO BE ADDRESSED IN AN AFFIDAVIT THAT ACCOMPANIES THE INITIAL FILING OF A SUIT.

THE STATUTE IS VERY CLEAR THAT ONLY ONE THING MUST BE ADDRESSED, AND IT HAS TO BE ADDRESSED BY AN EXPERT COMPETENT TO TESTIFY ABOUT A NEGLIGENT ACT OR OMISSION. THAT'S THE ONLY THING THE PLAINTIFF HAS TO DO IS CITE A VIOLATION OF THE APPLICABLE STANDARD OF CARE BY AN EXPERT COMPETENT TO TESTIFY.

NOW, I DON'T THINK IT WOULD BE CONTROVERSIAL, I THINK EVERYONE IN THIS ROOM WILL AGREE, THAT THE STANDARD OF CARE IS THAT DEGREE OF CARE AND SKILL CUSTOMARILY EXERCISED BY PHYSICIANS GENERALLY UNDER LIKE OR SIMILAR CIRCUMSTANCES AT THE TIME THE CARE IN ISSUE AROSE.

THAT'S THE BASIC CHARGE LANGUAGE THAT IS GIVEN TO THE JURY ON EVERY MALPRACTICE CASE. SO THE ISSUE IS VERY SIMPLE: UNDER THE CIRCUMSTANCES AND LIKE SURROUNDING CONDITIONS OF THE DEFENDANT, IN MY CASE, A NEONATOLOGIST, WHAT DOES THE STANDARD OF CARE REQUIRE?

[6] THE PLAINTIFF MUST PRODUCE A PHYSICIAN WHO IS COMPETENT TO TESTIFY ABOUT THAT AND CAN TESTIFY THAT THERE WAS A VIOLATION OF THAT STANDARD.

NOW, THE OTHER STATUTE THAT I THINK IS IN PLAY IS 24-9-67.1, THE STATUTE THAT I'M SURE THE COURT HAS READ DEALING WITH, MORE SPECIFICALLY, WHAT THE REQUIREMENT IS FOR THE EXPERT TO SHOW EXPERTISE.

BEFORE I TURN TO THE LANGUAGE I'M SURE WE'RE ALL PREPARED TO DEBATE, I WOULD LIKE TO DRAW THE COURT'S ATTENTION TO SUBPARAGRAPH E. IT'S, I THINK, SOMETIMES EASY TO OVERLOOK THIS SUBPARAGRAPH, BUT THE SUBPARAGRAPH SAYS AS FOLLOWS, QUOTE – THIS IS AGAIN REFERRING TO THE EVIDENCE REQUIREMENTS: AN AFFIANT MUST MEET THE REQUIREMENTS OF THIS CODE SECTION IN ORDER TO BE DEEMED QUALIFIED TO TESTIFY AS AN EXPERT BY MEANS OF THE AFFIDAVIT REQUIRED UNDER

9-11-9.1. THAT CLEARLY TIES THESE TWO STATUTES TOGETHER.

THE AFFIDAVIT REQUIREMENT HAS TO BE, UNDER SUBPARAGRAPH E, READ IN LIGHT OF THE REQUIREMENTS FOR SPECIFIC KNOWLEDGE.

WHEN YOU PUT THOSE TWO TOGETHER, WHEN YOU CONSTRUE THEM TOGETHER, I THINK CLEARLY WHAT THE STATUTES ARE TELLING US IS WHEN THE PLAINTIFF COMES INTO COURT WITH THEIR AFFIDAVIT, THEY FILE IT WITH THEIR COMPLAINT, THEY MUST HAVE AN AFFIDAVIT OF AN INDIVIDUAL WHO IS COMPETENT [7] TO TESTIFY ABOUT THE LIKE SURROUNDING CIRCUMSTANCES AND CONDITIONS OF THE DEFENDANT, WHO KNOWS, ON A DAY-TO-DAY BASIS, WHAT THE DEFENDANTS DO AND WHETHER OR NOT THEIR CONDUCT REPRESENTS A VIOLATION OF THE APPLICABLE STANDARD OF CARE.

AND THEN WHEN WE LOOK AT THE REST OF THE STATUTES, SPECIFICALLY 24-9-67.1(C), BEGIN PAREN SUB 2, THE STATUTES SAY THAT YOU HAVE TO HAVE THIS KNOWLEDGE BY VIRTUE OF HAVING BEEN REGULARLY ENGAGED IN THE ACTIVE PRACTICE OF SUCH SPECIALTY OF HIS OR HER PROFESSION FOR AT LEAST THREE OF FIVE YEARS, WHICH IS NOT IN ISSUE HERE, WITH SUFFICIENT FREQUENCY TO ESTABLISH AN APPROPRIATE

LEVEL OF KNOWLEDGE, AS DETERMINED BY THE JUDGE, IN PERFORMING THE PROCEDURE, DIAGNOSING THE CONDITION, OR RENDERING TREATMENT WHICH IS ALLEGED TO HAVE BEEN PERFORMED OR RENDERED NEGLIGENTLY BY THE DEFENDANT.

IT'S CLEAR THE STATUTE BASICALLY, TO PARTICULARIZE THIS CASE, SAYS THE PLAINTIFFS' EXPERT HAS TO SHOW THE COURT, IN SUCH A FASHION THAT THE COURT IS CONFIDENT THAT THE TRAINING AND EXPERIENCE EXISTS, THAT THIS EXPERT HAS THE KNOWLEDGE THAT YOU WOULD EXPECT OF A NEONATOLOGIST OR THAT WOULD BE EXPECTED OF A NEONATOLOGIST TO PERFORM HIS OR HER JOB. THAT'S THE ESSENCE OF THE MOTION.

IT'S OUR POSITION, OBVIOUSLY, I WOULDN'T BE HERE IF I THOUGHT THE PLAINTIFFS' ATTORNEY HAD MET THAT BURDEN. WE [8] FEEL THAT THEY'VE NOT.

NOW, UP UNTIL THIS MORNING, I WAS UNDER THE IMPRESSION THAT THE BASIC DOCUMENT BY WHICH THE PLAINTIFF SOUGHT TO FULFILL THIS BURDEN WAS THE AFFIDAVIT THAT WAS INITIALLY FILED WITH THE COMPLAINT.

THE AFFIDAVIT AS INITIALLY FILED WITH THE COMPLAINT DOES NOT SET FORTH, ON THE PART OF DR. SCHWARTZ, ANY KNOWLEDGE ABOUT WHAT NEONATOLOGISTS DO ON

A DAY-TO-DAY BASIS. IT DOES NOT SPECIFY ANYTHING ABOUT HIS DAY-TO-DAY WORK TO SPECIFY EXACTLY HOW HE MIGHT KNOW ANYTHING ABOUT WHAT THAT PARTICULAR SPECIALTY OF MEDICINE DOES, AND I WOULD POINT OUT TO THE COURT, SINCE THE COURT'S READ THE MATERIAL, I DON'T THINK THIS NEEDS TO BE BELABORED, BUT THE SPECIALTY OF NEONATOLOGY IS A NONSURGICAL SPECIALTY.

MY DOCTORS DON'T DO OPERATIONS. THEY DON'T – THEY JUST DON'T GO TO THE OPERATING ROOM AND OPERATE ON PEOPLE. THEY'RE NOT ALLOWED TO. THEY'RE NOT CREDENTIALED TO. THEY CAN'T DO IT.

DR. SCHWARTZ, IN HIS INITIAL AFFIDAVIT, SIMPLY, PARAGRAPH 4 IS AS CLOSE AS HE COMES TO SETTING FORTH ANY BACKGROUND INFORMATION ABOUT HIMSELF. HE DOESN'T SAY ANYTHING HERE ABOUT BEING A MEMBER OF ANY NEONATOLOGICAL ASSOCIATIONS OR GROUPS OR PROFESSIONS OR ANYTHING ELSE.

NOW, BASED ON THAT, I THINK OUR MOTION SHOULD BE GRANTED. HE HAS SIMPLY FAILED TO SET FORTH THAT HE KNOWS [9] THE LIKE SURROUNDING CIRCUMSTANCES AND DAY-TO-DAY ACTIVITIES OF A NEONATOLOGIST SUCH THAT HE COULD GIVE A REASONABLE OPINION AS TO WHETHER OR NOT THEIR FAILURE TO DO WHAT HE SAYS THEY

SHOULD HAVE DONE REPRESENTS A DEPARTURE FROM THE STANDARD OF CARE.

HE SAYS, AND I'M LOOKING HERE AT HIS AFFIDAVIT, PARAGRAPH TWO, IT IS MY OPINION THERE'S ABSOLUTELY NO REASON WHY THIS SHOULD NOT HAVE BEEN DONE, MEANING THE DIAGNOSIS OF THIS CONDITION, WHEN THE SYMPTOMATOLOGY WAS CLEAR AND DEFINITIVE IMAGING RESULTS WERE IN HAND.

SO HE FEELS THAT THE NEONATOLOGIST SHOULD HAVE TAKEN SOME ACTION, BUT HE – SIMPLY CUT TO THE CHASE – HE DOESN'T SET FORTH ANY BASIS OF BEING ABLE TO SAY BASED ON HAVING HAD THE SAME TRAINING AS A NEONATOLOGIST, HAVING HAD THE SAME WORK EXPERIENCE AS THE NEONATOLOGIST THAT THE AVERAGE, COMPETENT NEONATOLOGIST WOULD, IN FACT, KNOW THAT, AS OPPOSED TO SOME OTHER SPECIALTY.

NOW, I AM TOLD THAT THERE IS ANOTHER AFFIDAVIT THAT HAS BEEN SUBMITTED, AND I HAVE NOT SEEN IT YET. I WAS TOLD IT WAS FILED ON THE 18TH. IT HAD NOT MADE IT TO MY OFFICE AS OF YESTERDAY, AND MAYBE THAT'S THE MAIL'S FAULT, I DON'T KNOW, BUT I HAVE HAD A CHANCE TO GLANCE AT IT THIS MORNING, AND I DON'T KNOW WHETHER IT'S ON FILE WITH THE COURT OR NOT. IF IT'S NOT

ON FILE, I DON'T THINK WE NEED TO ADDRESS IT.

[10] THE COURT: THERE IS A MOTION TO SUPPLEMENT THE AFFIDAVIT THAT IS FILED WITH THE COURT.

MR. TANNER: AND I WOULD SUBMIT AT THIS POINT, HAVING ONLY HAD AN OPPORTUNITY TO BRIEFLY LOOK AT THAT AFFIDAVIT, MY READING OF IT DOES NOT CONVINCE ME THAT THE PLAINTIFF HAS OVERCOME THE BURDEN THAT THEY'VE GOT.

DR. SCHWARTZ IS A SURGEON, HAS THE TRAINING OF A SURGEON, AND WE – I WOULD POINT OUT FROM THE DEPOSITIONS AND THE AFFIDAVIT OF DR. KEYES AND TROYER WHO POINT OUT QUITE CLEARLY THAT SURGEONS HAVE A DIFFERENT ACTIVITY. SURGEONS ARE BOARDED OR CREDENTIALED, CERTIFIED BY A DIFFERENT BOARD. THEY HAVE A DIFFERENT RESIDENCY. THEY HAVE DIFFERENT CREDENTIALS IN A HOSPITAL THAT ARE GRANTED BY DIFFERENT DEPARTMENTS, SURGICAL DEPARTMENTS VERSUS NONSURGICAL DEPARTMENTS.

SO THE FACT THAT DR. SCHWARTZ MAY, FROM TIME TO TIME, WORK WITH A NEONATOLOGIST, WHICH I BELIEVE IS ALL THE AFFIDAVIT SAYS, DOES NOT, IN MY VIEW, MAKE HIM AN EXPERT TO SAY, LOOKING AT THE CASE FROM THE STANDPOINT OF A NEONATOLOGIST,

WITH THE MEDICAL TRAINING THEY HAVE, WITH THE RESIDENCY TRAINING THEY HAVE, WITH THE DAY-TO-DAY CONTINUING EDUCATION AND EXPERIENCE THEY HAVE, A NEONATOLOGIST FACING THIS SITUATION, ENTIRELY NONSURGICAL FROM THEIR VIEW, FROM THEIR PERSPECTIVE OF WHAT THEY DO, WOULD BE EXPECTED TO MAKE THIS CALL.

[11] THAT'S WHAT IS NOT BEING SAID HERE, AND I DON'T BELIEVE THEY HAVE SHOWN THE NECESSARY BACKGROUND AND EXPERTISE AND TRAINING ON THE PART OF DR. SCHWARTZ TO CARRY THE BURDEN THAT THEY HAVE TO UNDER THE STATUTE.

I COULD – YOU KNOW, I COULD PROLONG MY ARGUMENT, BUT I THINK THE COURT UNDERSTANDS OUR POSITION, AND BASED UPON THAT, I'LL YIELD THE FLOOR TO OTHERS.

THE COURT: THANK YOU, COUNSEL.

MS. COTY: GOOD MORNING, YOUR HONOR. MY NAME IS DARCY COTY. I REPRESENT DR. GOWER AND DR. THOMSEN IN THIS CASE. THEY ARE TWO PEDIATRIC OTOLARYNGOLOGISTS NAMED BY THE DEFENDANTS.

WE WERE EXPECTING A LITTLE MORE OF AN EVIDENTIARY HEARING THIS MORNING, IN LIGHT OF JUDGE FLAKE'S ORDER, AND IN LIGHT OF THAT, WE CAME IN THIS MORNING, FILED THE ORIGINAL AFFIDAVITS OF EACH OF

OUR CLIENTS WITH THE CLERK. I KNOW YOU DON'T HAVE THOSE YET, SINCE WE JUST FILED THEM THIS MORNING. CAN I GIVE COPIES TO YOU, SINCE I KNOW THAT YOU DON'T HAVE THEM, OR WILL THE CLERK'S OFFICE FORWARD THEM TO YOU LATER?

THE COURT: YOU CAN GIVE ME A COPY. DOES OPPOSING COUNSEL HAVE A COPY?

MS. COTY: YES, THEY DO. I'VE SERVED ALL PARTIES, AND, OF COURSE, WE FILED THOSE THIS MORNING, IN LIGHT OF THE FACT WE KNEW THIS WAS AN EVIDENTIARY HEARING WHERE WE [12] WOULD BE PERMITTED TO PRESENT EVIDENCE, BUT IT SEEMS THAT DR. SCHWARTZ IS NOT HERE AS WE EXPECTED.

I DON'T WANT TO SPEND A LOT OF TIME REHASHING EITHER THE ARGUMENTS MADE IN OUR BRIEF, ESPECIALLY SINCE THEY WERE SUCCINCTLY SET FORTH IN JUDGE FLAKE'S ORDER, AND I DON'T WANT TO REHASH A LOT OF WHAT MR. TANNER HAS ALREADY SAID, THOUGH WE WOULD CERTAINLY ADOPT THE ARGUMENT THAT MR. TANNER HAS MADE AS IT APPLIES TO OUR CLIENTS, THE PEDIATRIC OTOLARYNGOLOGISTS IN THIS CASE.

I THINK WE SEE THIS CASE A LITTLE BIT DIFFERENTLY THAN THE PLAINTIFFS, IN TERMS OF WHAT THE AFFIDAVIT ISSUE IS. IT'S NOT SIMPLY A FACT THAT DR. SCHWARTZ, A

PEDIATRIC SURGEON, IS IN A DIFFERENT SPECIALTY THAN THE PEDIATRIC OTOLARYNGOLOGISTS, BUT IT'S ALSO THE FACT THAT DR. SCHWARTZ SIMPLY DOES NOT DO THE PROCEDURES THAT DR. – THAT HE ALLEGES DR. GOWER AND DR. THOMSEN NEGLIGENTLY PERFORMED; AND IF HE DOES NOT PERFORM THOSE PROCEDURES, HAVE EXPERIENCE PERFORMING THOSE PROCEDURES, ROUTINELY DO THOSE PROCEDURES, THEN CERTAINLY HE WOULD NOT HAVE THE KNOWLEDGE OF THE LIKE SURROUNDING CIRCUMSTANCES IN WHICH DR. GOWER OR DR. THOMSEN ARE OUT PRACTICING AS PEDIATRIC OTOLARYNGOLOGISTS AND DOING THE EXACT PROCEDURES THAT THEY ALLEGEDLY DID NEGLIGENTLY.

I ALSO DIDN'T RECEIVE A COPY OF DR. SCHWARTZ'S SUPPLEMENTAL AFFIDAVIT, BUT MR. DAUGHERTY WAS KIND ENOUGH [13] TO LET ME TAKE A LOOK AT IT THIS MORNING, AND I DON'T THINK IT REALLY CHANGES ANYTHING. I THINK IT SORT OF REITERATES A LOT OF WHAT WE SEE IN DR. SCHWARTZ'S INITIAL AFFIDAVIT, WHICH IS HIS KNOWLEDGE AS A GENERAL PEDIATRIC SURGEON; THE FACT THAT HE WAS TRAINED AS A PEDIATRIC SURGEON; THAT HIS RESIDENCY AND FELLOWSHIP TRAINING WAS IN A DIFFERENT FIELD, AGAIN, PEDIATRIC SURGERY; THAT HE PRACTICES AND TEACHES IN THAT FIELD; AND THAT HE

HAS NO EDUCATION, NO TRAINING, AND NO EXPERIENCE PRACTICING IN A DAY-TO-DAY SITUATION AS A PEDIATRIC OTOLARYNGOLOGIST OR PERFORMING THE ACTUAL PROCEDURES THAT PEDIATRIC OTOLARYNGOLOGISTS PERFORM.

AND AS YOU'LL SEE IN THE AFFIDAVITS OF DR. GOWER AND DR. THOMSEN, WHAT THEY'VE SAID IS THAT THE PROCEDURES THAT ARE AT ISSUE IN THIS CASE ARE SIMPLY NOT PERFORMED BY PEDIATRIC SURGEONS AND THAT THERE'S NO OVERLAP WHEN IT COMES TO THOSE SPECIFIC AREAS OF WHICH DR. SCHWARTZ IS CRITICAL OF THEM.

AT THIS POINT, BASED ON THE EVIDENCE THAT THE PLAINTIFFS HAVE PUT FORTH IN TERMS OF THE TWO AFFIDAVITS THEY'VE SUBMITTED BY DR. SCHWARTZ, THERE'S NOTHING TO REBUT THAT ASSERTION THAT DR. GOWER AND DR. THOMSEN HAVE MADE.

AND IN TERMS OF THEN LOOKING AT THE COMBINATION OF SECTION 9-11-9.1 AND SECTION 24-9.67.1, IT'S CLEAR THAT [14] DR. SCHWARTZ DOESN'T HAVE ACTUAL PROFESSIONAL KNOWLEDGE AND EXPERIENCE EITHER IN PRACTICING FOR THREE OF THE LAST FIVE YEARS OR TEACHING FOR THREE OF THE LAST FIVE YEARS AS A PEDIATRIC OTOLARYNGOLOGIST. AND BEYOND THE FACT THAT IT'S A DIFFERENT SPECIALTY, WHEN YOU REALLY

LOOK AT DOES HE HAVE THE EXPERIENCE TO COMMENT ON WHAT'S AT ISSUE IN THIS CASE, AS IT RELATES TO DR. GOWER AND DR. THOMSEN, THERE'S NOTHING THAT SHOWS THAT FOR THREE OF THE LAST FIVE YEARS HE HAS, WITH SUFFICIENT FREQUENCY – THAT HE HAS EXPERIENCED PERFORMING THE EXACT OTOLARYNGOLOGICAL PROCEDURES THAT DR. – I KNOW IT'S QUITE A HEFTY WORD – THAT DR. GOWER AND DR. THOMSEN ALLEGEDLY NEGLIGENTLY PERFORMED.

AND IF YOU LOOK AT DR. SCHWARTZ'S INITIAL AFFIDAVIT, THE ONLY ASSERTIONS THAT ARE LODGED BY DR. SCHWARTZ IS THAT DR. THOMSEN WAS NEGLIGENT FOR PLACING A TRACHEOTOMY AND THAT DR. GOWER NEGLIGENTLY PERFORMED A SUBMANDIBULAR GLAND INCISION AND PAROTID DUCT LIGATION. BUT NOWHERE IN THE AFFIDAVITS DOES IT SAY, I HAVE EXPERIENCE, EDUCATION, TRAINING, AND AM DOING, ON A DAY-TO-DAY BASIS, TRACHEOTOMIES OR PERFORMING SUBMANDIBULAR GLAND INCISIONS AND PAROTID DUCT LIGATIONS, SUCH THAT I'M QUALIFIED TO SAY THAT IT WAS NEGLIGENT TO HAVE PERFORMED THESE PROCEDURES.

IN LIGHT OF THIS, YOUR HONOR, AND IN LIGHT OF THE FACT THAT PLAINTIFFS HAVE FAILED TO MEET THEIR BURDEN OF [15] PROVIDING THE AFFIDAVIT OF AN EXPERT WHO IS COMPETENT TO PRESENT EXPERT TESTIMONY

AGAINST THE TWO PEDIATRIC OTOLARYNGOLOGISTS IN THIS CASE, DR. THOMSEN AND DR. GOWER, WE WOULD RESPECTFULLY ASK THE COURT TO GRANT OUR MOTION TO DISMISS.

THE COURT: THANK YOU, COUNSEL.

MR. LAVENDER: YOUR HONOR, I'M TED LAVENDER. I REPRESENT CHILDREN'S HEALTHCARE OF ATLANTA IN THIS CASE. WE DO NOT CURRENTLY HAVE A MOTION PENDING BEFORE THIS COURT, BUT WE'RE IN A PARTICULAR AND PECULIAR SITUATION DIFFERENT FROM THE OTHER DEFENDANTS IN THIS CASE.

WE ARE IN THIS CASE STRICTLY THROUGH VICARIOUS LIABILITY, AS IT APPLIES TO THE FOUR PHYSICIANS WHO ARE REPRESENTED BY THESE TWO ATTORNEYS HERE.

WE INITIALLY FILED A MOTION TO DISMISS WITH OUR ANSWER ON THE BASIS THAT THERE WERE NO ALLEGATIONS IN DR. SCHWARTZ'S COMPLAINT AGAINST CHILDREN'S HEALTHCARE OF ATLANTA.

THE COURT: IF I REMEMBER, YOUR MOTION TO DISMISS HAS ALREADY BEEN DENIED; IS THAT CORRECT?

MR. LAVENDER: THAT IS CORRECT, AND I'M NOT HERE – I'M HERE TO ASK THE COURT TO RECONSIDER IT ON THE LIMITED

BASIS THAT IF THE COURT DEEMS – IF THE COURT GRANTS THE MOTIONS OF THE NEONATOLOGISTS OR THE ENT/OTOLARYNGOLOGISTS, THEN I WOULD REQUEST THE COURT'S [16] ORDER INCLUDE DISMISSING THOSE CLAIMS AGAINST CHILDREN'S HEALTHCARE THAT ARE VICARIOUS CLAIMS THROUGH THOSE FOUR PHYSICIANS, OR ANY NUMBER OF THOSE PHYSICIANS, THAT THE COURT DISMISSES ON THE BASIS THAT – AND I THINK EVERYONE WOULD AGREE – THAT IF YOU ARE GOING TO ACCUSE THE PRINCIPAL OF SOMETHING, THEN YOU HAVE TO HAVE AN ADEQUATE AFFIDAVIT AGAINST THE AGENT WHO IS THE ONE WHO IS ACCUSED OF ACTUALLY COMMITTING THE NEGLIGENCE, AND THAT IS THE ONLY REASON THAT CHILDREN'S HEALTHCARE OF ATLANTA IS IN THIS CASE AS IT PERTAINS TO THE FOUR PHYSICIANS REPRESENTED HERE TODAY.

NOW, THERE WAS AN AMENDED COMPLAINT, AND THERE ARE SEPARATE – THERE'S A SEPARATE ALLEGATION AGAINST CHILDREN'S HEALTHCARE NOW THAT IS SEPARATE FROM THE PHYSICIANS. SO I'M NOT ASKING THAT WE BE DISMISSED ENTIRELY. I'M ASKING SIMPLY THAT TO THE EXTENT THAT THE COURT DISMISSES DRS. TROYER, KEYES, GOWER, OR THOMSEN THAT THE ORDER BE SUCH THAT ANY LIABILITY ALLEGED TO HAVE OCCURRED OR ALLEGED THAT THEY COMMITTED, THAT CHILDREN'S HEALTHCARE OF ATLANTA ALSO BE

DISMISSED FROM THOSE CLAIMS AS WELL. THANK YOU.

THE COURT: THANK YOU, COUNSEL.

MR. DAUGHERTY, IT'S YOUR TURN.

MR. DAUGHERTY: YES, MA'AM. YOUR HONOR, SO THE COURT HAS A LITTLE BACKGROUND, SINCE THIS TIME, WE HAVE TAKEN [17] DEPOSITIONS OF MOST OF THESE PEOPLE, AND THE COURT MAY BE AWARE, THESE PEOPLE, THEY ARE ON – THE DOCTORS THAT WE'RE SUING CLAIM THAT THEY HAD ABSOLUTELY NOTHING TO DO WITH VASCULAR RINGS. THIS IS NOT ABOUT A NEGLIGENCE OF PERFORMING A PROCEDURE, YOUR HONOR. THIS IS NOT – WHAT THIS IS ABOUT IS THIS WAS A CHILD WHO WAS BORN WITH A VASCULAR RING.

THE CHILD WAS TAKEN TO THE HOSPITAL WHERE THEY WERE CALLED – THESE DOCTORS WERE CALLED IN TO SEE THIS CHILD. IT IS CLEAR THROUGHOUT THE TIME THAT THEY DID IT THAT THIS CHILD WAS HAVING PROBLEMS BREATHING, HAS ASPIRATING, HAS HOARSENESS OF BREATH, AND WASN'T ABLE TO EAT. THESE ARE ALL – PLUS REFLUX. WE ALSO KNOW THAT REFLUX IS ALSO A CONDITION OF VASCULAR RINGS.

DURING THE TREATMENT AT THE HOSPITAL, WHEN WE TOOK THE DOCTORS' – ONCOLOGISTS' (SIC) DEPOSITION, THEY INDICATE THAT THEY DON'T KNOW ANYTHING ABOUT VASCULAR RINGS; HOWEVER, IN THEIR DEPOSITIONS, WE SHOW THAT 12 PERCENT OF THEIR TEST TO GET BOARD CERTIFIED, JUDGE, DEALS WITH RESPIRATORY AND DIAGNOSIS AND MANAGEMENT OF VASCULAR RINGS. SO THE AFFIDAVITS YOU HAVE BEEN GIVEN IS – WE SAY IS NOT, IF YOU HAVE THE DEPOSITION, IS NOT SO.

PLUS THE DEFENSE ATTORNEY FOR THESE DOCTORS, DR. KEYES, DR. TROYER, THEY REFUSED TO LET US EXAMINE THEM [18] ON THEIR AFFIDAVIT. WE DON'T THINK IT CAN BE USED ANYWAY, BUT WE DON'T THINK THAT'S DISPOSITIVE OF THE ISSUE ANYWAY.

WHAT THE COURT, AND I DON'T KNOW IF THE – I DON'T BELIEVE THE COURT HAS THEM, BUT IS – THERE'S A NEW CASE THAT'S COME OUT, AND, OF COURSE, THE COURT IN ITS ORDER INDICATED UNDER *LENNEN VS. DEPARTMENT OF TRANSPORTATION*, THAT WE HAD A RIGHT, AND AS WE DO UNDER THE LAW, TO AMEND OUR AFFIDAVIT TO SAY WHAT OUR QUALIFICATIONS ARE.

NOW, I BELIEVE THE COURT HAS OUR AFFIDAVIT OF DR. SCHWARTZ. WE CHECKED AND IT WAS FILED THREE OR FOUR DAYS AGO,

AND WE CHECKED WITH THE COURT, AND THEY SAID IT WAS IN YOUR OFFICE, AND I – WHAT WE WANT TO TALK ABOUT IS, IN THIS CASE, THIS IS A – THIS IS A – WHERE THE DOCTORS FAILED TO TREAT AN ABSOLUTE, AND REFER OUT TO SPECIALISTS, YOUR HONOR, A DIAGNOSED, FOUND, CONFIRMED VASCULAR RING.

WE HAVE TAKEN A DEPOSITION OF DR. KANTER ALREADY, WHO IS A TREATING PHYSICIAN, WHO DIVIDED THE VASCULAR RING, AND HE HAS GIVEN TESTIMONY, JUDGE, UNEQUIVOCALLY THIS: THAT THE CHILD HAD BREATHING PROBLEMS, ASPIRATION IN HIS LUNGS –

THE COURT: COUNSEL, HELP ME UNDERSTAND HOW THAT GOES TO DR. SCHWARTZ AS AN EXPERT THAT CAN TESTIFY –

MR. DAUGHERTY: I'M GETTING READY TO TELL THAT BASICALLY IS – VASCULAR RINGS NEED TO BE DEALT WITH [19] PEOPLE IMMEDIATELY; THAT THEY NEED – WHEN YOU HAVE THAT, THOSE NEED TO GO TO PEOPLE WHO DEAL WITH VASCULAR RINGS.

NOW, IF YOU LOOK AT THE AFFIDAVIT OF DR. SCHWARTZ, HE GIVES YOU ALL OF HIS QUALIFICATIONS, HOW FOR MORE THAN 30 YEARS HE'S BEEN TEACHING, ALL THIS STUFF. HE ALSO INDICATES THAT HE WORKS WITH AND – CONTINUOUSLY IN DIAGNOSING AND

TREATING WITH THE ENT'S, ONCOLOGISTS (SIC); THAT HE – THAT'S WHAT HE DOES. HE HAS KNOWLEDGE AND HE WORKS WITH THEM AND DIAGNOSES AND HE PERFORMS THE SURGERY, AND THEY'RE SUPPOSED TO, BASICALLY, REFER THESE THINGS OVER TO HIM WHENEVER THEY FIND A VASCULAR RING.

WHAT WE'RE HERE ABOUT, YOUR HONOR, IS – THE FACT IS THAT WE HAVE A CT SCAN UNEQUIVOCALLY SHOW THAT IN MARCH, RIGHT AFTER THE CHILD WAS BORN, THERE WAS ABSOLUTELY A VASCULAR RING. WE HAVE TAKEN – NONE OF THESE DOCTORS EVER MENTION ANYWHERE IN ANY OF THEIR RECORDS ANYWHERE ABOUT – ANYTHING ABOUT THIS VASCULAR RING.

THE EVIDENCE IS PRETTY CLEAR, WHEN YOU HAVE A VASCULAR RING, THERE IS NO TREATMENT FOR A VASCULAR RING OTHER THAN SURGERY, PERIOD. THESE PEOPLE DID NOT REFER THIS CHILD OUT TO A PERSON. THEY KNEW – IT WAS RIGHT THERE AS A VASCULAR RING. THEY'RE RESPONSIBLE FOR LOOKING AT THE TESTS. THEY'RE RESPONSIBLE FOR LOOKING AT THE RECORDS. THEY'RE RESPONSIBLE ON TESTS THAT THEY ORDERED, TO LOOK AT, AND THESE TESTS CAME BACK UNEQUIVOCALLY THAT – [20] THE CHILD HAD A VASCULAR RING.

THE COURT: ISN'T THE ISSUE WHETHER DR. SCHWARTZ KNOWS ENOUGH ABOUT WHAT THESE DEFENDANT PHYSICIANS DO –

MS. KRIVITSKY: NO, THAT'S NOT THE ISSUE. THAT'S NOT THE ISSUE –

THE COURT: I'M SORRY. I'M SORRY.

MR. DAUGHERTY: UNDER THE NEW CASE LAW – THAT'S WHAT I'M GETTING AROUND TO, THE COURT HAS COME OUT WITH TWO CASES, JUDGE, ONE WHICH WAS DECIDED – WHICH ABSOLUTELY THROWS ALL THEIR THEORY OUT THAT THEY'VE TALKED TO YOU ABOUT. THEY'RE FAMILIAR – I KNOW THEY'RE FAMILIAR WITH THE CASE IN JULY, AND THEY FORGOT TO MENTION THAT CASE TO YOU. THERE'S A CASE THAT CAME OUT IN JULY WHICH IS CALLED – DO YOU HAVE IT THERE? DO YOU HAVE THE JULY CASE? YES – WHICH IS CALLED *COTTEN VS. PHILLIPS*, CITED JULY THE 6TH, 2006. I'LL – IF I CAN GIVE –

THE COURT: ALL RIGHT.

MR. DAUGHERTY: – THE CASE TO THE COURT. THIS ABOUT THE SAME SPECIALTY IS A BUNCH OF PHOOEY. MATTER OF FACT, THE COURT SAYS THAT IN THAT DECISION, IT'S A BUNCH OF PHOOEY; THAT YOU DON'T HAVE TO HAVE – WHERE PEOPLE HAVE CASES OR DO SOMETHING WRONG, YOU DON'T HAVE TO HAVE A DOCTOR IN EVERY SPECIALTY TO

COME IN AND SUE THE DOCTORS WHO SCREWED UP. ALL YOU HAVE TO DO IS HAVE A DOCTOR WHO CAN TESTIFY TO HIS EXPERTISE.

[21] AND THIS WAS FURTHERMORE UPHELD YESTERDAY – EXCUSE ME – DAY BEFORE YESTERDAY BY THE COURT OF APPEALS WHO CAME OUT ON SEPTEMBER THE 20TH, WHICH I THINK IS ABSOLUTELY – IT MAKES THIS MOTION MOOT, YOUR HONOR. AS A FURTHER DECISION, ON SEPTEMBER THE 20TH, OUR COURT OF APPEALS RULED IN THE CASE OF *ABRAMSON, ET AL., VS. WILLIAMS*, IT IS NUMBER A06A1493, DECIDED SEPTEMBER THE 20TH, 2006, AND THEY PRETTY MUCH ADDRESSED EXACTLY WHAT THE PLAINTIFFS IN THIS CASE WERE ARGUING, PRETTY MUCH UNEQUIVOCALLY TO THE TEE.

THEY TRIED TO SAY THAT THEY HAD TO HAVE SOMEONE WHO COULD TESTIFY ABOUT WHAT ONCOLOGISTS (SIC) DO OR WHAT ENT'S DO. THEY SAID, NO, THAT'S NOT SO. THAT'S NOT THE ISSUE IN A MEDICAL MALPRACTICE CASE. THE ISSUE IS CAN THEY TESTIFY ABOUT WHAT THEIR SPECIALTY IS AND WHAT IT WAS – THIS IS THE CAUSATION.

WHAT HAPPENED WAS, JUDGE, THIS CHILD HAD A TRACH, HAD ALL THESE PROBLEMS, AND IT HAD – THE ARTERY GREW AROUND THE CHILD'S WINDPIPE, AND WHEN YOU HAVE

THAT, YOU END UP WITH CHOKING. YOU END UP WITH HOARSENESS OF BREATH, AND YOU END UP WITH NOT BEING ABLE TO EAT.

NOW – OR THRIVE. THAT'S WHAT THEY CALL IT. AND WHEN YOU HAVE THOSE, IT'S PRETTY CLEAR THERE'S NO TREATMENT FOR A VASCULAR RING OTHER THAN SURGERY. AND THESE PEOPLE, ONCE YOU HAVE THESE SYMPTOMS, ONLY THING YOU [22] DO IS REFER IT, AND WE HAVE THIS BACKUP OPINION FROM DR. SCHWARTZ – EXCUSE ME – FROM DR. KANTER, ONLY THING YOU DO IS REFER IT TO A SPECIALIST, A VASCULAR RING, WHO IMMEDIATELY TAKES THE CHILD TO SURGERY AND DIVIDES THE VASCULAR RING, AND THEY DID THIS TO THIS CHILD TWO-AND-A-HALF YEARS LATER AND ALL THE SYMPTOMS LEFT. FOR TWO-AND-A-HALF YEARS, THEY REMOVED SALIVARY GLANDS. THEY STAPLED HIS STOMACH UP. THEY PUT TUBES IN HIM. THEY KEPT HIM ON A TRACH, AND THEY TOOK THE VASCULAR RING OUT, JUDGE, AND THE SAME DAY THEY TOOK THE VASCULAR RING OUT, HE NEVER NEEDED THE TRACH AGAIN, NEVER HAD ANY OTHER PROBLEMS. THAT IS UNDISPUTED IN THIS CASE.

NOW, DR. SCHWARTZ IS AN EXPERT WHO GAVE AN OPINION THAT THESE NEONATOLOGISTS, THESE ENT'S, WHEN YOU HAVE A VASCULAR RING, HE WORKED WITH – THEY SHOULD GIVE THEM TO HIM. ONCE THE

SYMPTOMS ARE THERE, THE CHILD NEEDS TO IMMEDIATELY GO TO SURGERY AND REMOVE THE VASCULAR RING. THEY DIDN'T DO IT.

THIS IS FAILURE TO DIAGNOSE. THIS IS NOT A SUIT ABOUT THEM PERFORMING A NEGLIGENT SURGERY. THIS IS ABOUT THEM PERFORMING A SURGERY THAT SHOULD HAVE NEVER BEEN DONE BECAUSE THE KID NEVER HAD ANY OF THIS STUFF. HE HAD A VASCULAR RING. THESE ARE ALL SYMPTOMS FOR WHAT THEY WERE DOING. THEY WERE REMOVING THE KID'S SALIVARY GLANDS BECAUSE THE SALIVA'S STOPPING UP AND GOING INTO HIS LUNGS [23] WHEN, IN FACT, HE HAD A VASCULAR RING AROUND HIS – AROUND HIS TRACHEA, JUDGE, THAT WAS –

THE COURT: I'M NOT SURE HOW THAT GOES TO THE EXPERT ISSUE THAT IS BEFORE THE COURT.

MR. DAUGHERTY: THAT'S CORRECT. SO WHAT THEY'RE SAYING IS VERY SIMPLY, AND HE CAN TESTIFY AS TO THE CAUSATION AND WHAT IT IS, AND YOU DON'T HAVE TO HAVE AN ENT, BECAUSE ENT'S DO NOT OPERATE ON VASCULAR RINGS. THEY DO NOT. THEY CAN GO IN, AND THEY ADMITTED THAT THEY KNEW THEY HAD A VASCULAR RING. THEY'VE ADMITTED THEY NEVER CALLED IN A PERSON WHO DOES SURGERY SPECIFICALLY TO TREAT

VASCULAR RINGS FOR THIS CONDITION. WE'VE TAKEN THEIR DEPOSITION.

NOW, WHAT WE GOT, VERY SIMPLY, IS A CASE – IS CAN OUR EXPERT COME FORWARD AND SAY THERE WAS AN ABSOLUTE, UNEQUIVOCAL TEST SHOWS A VASCULAR RING ON THE CT SCAN. WE HAVE THE TESTIMONY OF THE DOCTOR THAT HE REVIEWED THE CT SCAN, HE REVIEWED THE FILMS, AND IT WAS THE SAME THING, THIS IS DR. KANTER, ON THE CT SCAN REPORT, ON THE CT SCAN ITSELF, AND AS WELL IN THE SURGERY, THEY WERE ALL THE SAME. THE KID HAD A VASCULAR RING AND THAT THE SURGERY SHOULD HAVE BEEN DONE IMMEDIATELY AFTER THE CT SCAN.

NOW, WE'RE HERE WITH DR. SCHWARTZ SAYING HE DOES PEDIATRIC SURGERY. HE DOES VASCULAR RINGS. HE WORKS WITH THEM. ESSENTIALLY, THEY WERE NEGLIGENT IN NOT GETTING [24] THIS CHILD OVER TO THEM TO WHERE THEY COULD DO THE SURGERY, AND THEN ALL THESE SURGERIES THESE TWO-AND-A-HALF YEARS AND ALL THESE COMPLICATIONS AND LIFETIME THINGS WOULD HAVE NEVER BEEN A PROBLEM BECAUSE THEY WERE NEVER NECESSARY, BECAUSE THESE WERE ALL PROBLEMS WITH VASCULAR RINGS AND NOT – WAS NOT A PROBLEM – THEY SAID HE HAD A SWALLOWING PROBLEM. THEY SAID HE HAD A SWALLOWING PROBLEM. THEY TOOK

THE VASCULAR RING OUT, JUDGE, DR. KANTER DID, TWO-AND-A-HALF YEARS LATER. HE HAD IT TEN MINUTES BEFORE THEY REMOVED THE VASCULAR RING. TEN MINUTES AFTER HE REMOVED THE VASCULAR RING, HE DIDN'T HAVE IT. IT'S GONE. ALL THIS STUFF IS GONE.

IT'S A TERRIBLE THING THAT'S HAPPENED TO THIS CHILD, AND WE'RE JUST IN HERE BASICALLY TESTIFYING THAT THEY HAD THE VASCULAR RING. THEY – IT WAS THERE. THEY FAILED TO TREAT IT. THEY FAILED – THEY IGNORED IT. THEY DIDN'T DO ANYTHING WITH IT, AND THAT THAT WAS NEGLIGENT, AND THE SOLE THING SHOULD HAVE BEEN DONE WOULD HAVE BEEN THE REMOVAL OF THE VASCULAR RING, AND THEY WERE NEGLIGENT IN NOT SENDING THE CHILD OUT TO A CORRECT EXPERT WHO COULD PERFORM THE SURGERY. AND WHEN THEY DID, THEY PERFORMED THE SURGERY, AND THE SYMPTOMS WENT AWAY.

NOW, THAT'S WHAT THEY SHOULD HAVE DONE TWO-AND-A-HALF YEARS BEFORE, AND THAT'S WHAT DR. SCHWARTZ IS SAYING THEY SHOULD HAVE DONE TWO-AND-A-HALF YEARS BEFORE.

[25] THE COURT: IS THERE ANY INDICATION IN DR. SCHWARTZ'S AFFIDAVIT THAT HE DOES THE TYPE OF – WHAT IS REQUIRED OR HAS THE SKILL, THE TRAINING, OR EXPERTISE

TO DO THE TYPE OF DIAGNOSIS AND WORK THAT THE DEFENDANT PHYSICIANS HAVE IN THIS CASE?

MR. DAUGHERTY: JUDGE, THE THING ABOUT IT IS THIS, WHEN YOU HAVE A VASCULAR RING – AND YOU CAN GO GOGGLE IT. IT'S SO SIMPLE YOU CAN GOGGLE IT ON THE INTERNET, AND IT SAYS – WHEN IT TALKS ABOUT RIGHT AORTIC ABERRANT SUBCLAVIAN RING, WHICH MEANS – THAT'S ANOTHER LONG MEDICAL TERM FOR VASCULAR RING. THAT MEANS THERE'S A RING AROUND THE ESOPHAGUS WHERE IT WRAPS AROUND AND IS BASICALLY PUSHING TO THE LEFT.

NOW, IT SAYS THESE ARE THINGS YOU DO NOT DEVELOP, YOUR HONOR. THESE DOCTORS, THEY WERE – THIS IS A CONGENITAL SOMETHING THAT YOU ARE BORN WITH, AND WHEN YOU HAVE THESE – AND THE DATA IS ABSOLUTELY CLEAR – WHEN YOU HAVE A VASCULAR RING, WHERE YOU HAVE CHOKING OR UNABLE TO BREATHE, UNABLE TO SWALLOW, AND HOARSENESS, IN OTHER WORDS, WHEN THE BABY (DEMONSTRATING SOUND), THEY'RE BEING STRANGLED, AND ALSO EVEN REFLUX, YOU TAKE THE CHILD IMMEDIATELY WITH THOSE SYMPTOMS AND YOU DIVIDE THE VASCULAR RING. THERE'S NO IF'S, ANDS, OR BUT'S BECAUSE THERE IS NO OTHER TREATMENT OTHER THAN THE DIVISION OF THE VASCULAR RING, NONE.

[26] THAT'S WHAT ALL THE MEDICAL DATA DID, AND THIS CHILD HAD EVERY ONE OF THOSE SYMPTOMS, AND NONE OF THESE DOCTORS EVER REFERRED THIS CHILD OUT TO A PERSON WHO DEALS WITH VASCULAR RINGS, PERIOD.

AND THAT'S WHAT WE'RE HERE ABOUT IS THAT SIMPLY THAT ONCE IT GOT TO DR. KANTER, WHO IS A PEDIATRIC CARDIOTHORACIC SURGEON WHO DOES THE SAME SURGERY THAT DR. SCHWARTZ DOES, HE SAW THE CHILD, AND HIS TESTIMONY IS, AFTER THEY TOLD HIM ABOUT THE SYMPTOMS, HE SAID, WELL, YOU MAY HAVE A VASCULAR RING. LET'S ORDER A CT SCAN. IF YOU HAVE A VASCULAR RING, I THINK WE CAN – IF HE DOES, WE CAN REMOVE IT, AND IT GOES AWAY, AND HIS TESTIMONY, CLEAR IN THE DEPOSITION, IS HE ORDERED A CT SCAN. THEY SAID, THERE'S ALREADY A CT SCAN HERE, DOCTOR. WE DID THE CT SCAN TWO-AND-A-HALF YEARS AGO –

THE COURT: HE'S AN ORTHOPEDIC SURGEON?

MR. DAUGHERTY: HUH? NO, HE IS A THORACIC SURGEON.

THE COURT: THORACIC SURGEON.

MR. DAUGHERTY: PEDIATRIC – DOES THE SAME SURGICAL –

THE COURT: HE'S A SURGEON.

MR. DAUGHERTY: AND HE SAYS THERE'S ALREADY ONE, AND THERE IS A VASCULAR RING THERE, AND HE SAID – AND HE DIAGNOSED IT EVEN BEFORE HE ORDERED IT THAT I THINK YOU HAVE A VASCULAR RING, AND WHEN HE GOT THE TEST, WHICH WAS [27] DONE THREE YEARS – TWO-AND-A-HALF YEARS BEFORE, THEY IMMEDIATELY TOOK THE CHILD TO SURGERY AND REMOVED THE VASCULAR RING, AND THAT WAS THE END OF THE DEAL WITH THE CHILD.

HE HAD NO MORE SWALLOWING PROBLEMS. THEY REMOVED THE TUBE, AND IT ALL WENT AWAY, AND THIS KID LAID WITH A TRACHEOTOMY –

THE COURT: COUNSEL, I UNDERSTAND. OBVIOUSLY, IN ANY MEDICAL –

MR. DAUGHERTY: IT'S JUST LIKE THIS. I DON'T THINK YOU HAVE TO BE ABLE TO DO – I GO TO A DOCTOR AND THEY FIND I HAVE A CANCER ON ME. DO I HAVE TO GO TO A SPECIALIST TO SAY THAT THEY WERE NEGLIGENT IN NOT REFERRING IT OUT? I THINK ANY DOCTOR CAN SAY THAT IF YOU HAVE A CARCINOMA ON YOU THAT YOU NEED TO REFER IT TO SOMEONE TO TAKE CARE OF THE CARCINOMA.

THIS DOCTOR HERE, HE IS FAMILIAR WITH VASCULAR RINGS. HE WORKS WITH THESE PEOPLE. HE WORKS WITH THESE DOCTORS. HE PERFORMS THIS SURGERY. HE'S QUALIFIED

AND HAS BEEN DOING IT FOR 30 YEARS, AND HE TEACHES IT, AND THEY'RE SAYING THAT HE'S NOT QUALIFIED TO GIVE HIS OPINION IN THIS CASE THAT THE CHILD HAD A VASCULAR RING AND THAT THESE OTHER PROCEDURES – THESE WERE AS A RESULT OF A VASCULAR RING, AND IF YOU LOOK AT THIS CASE LAW I GAVE YOU, THE COURT OF APPEALS SAYS HE CAN. HE DOES NOT HAVE TO BE IN [28] THE SAME FIELD AS THE THEIR DOCTORS, AND IT UNEQUIVOCALLY SAYS THAT.

THE COURT: I DON'T BELIEVE THE DEFENDANTS CONTEND THAT HE HAS TO BE THE EXACT BOARD CERTIFIED SPECIALTY, BUT THE AFFIANT WOULD NEED TO AT LEAST HAVE THE SAME UNDERSTANDING, TRAINING, AND SKILL AS WHAT THE DEFENDANTS DO ON A REGULAR BASIS THAT THEY COULD BE SUED FOR.

MR. DAUGHERTY: AND THAT'S WHAT HE DOES. HE DEALS ON A REGULAR BASIS WITH THE ENT'S AND THE DOCTORS DEALING WITH VASCULAR RINGS. HE DOES IT AND DEALS WITH THESE PEOPLE, AND THESE PEOPLE, DR. KEYES AND THEM, THEY ARE PEOPLE WHO IN NEWBORN BABIES ARE SUPPOSED TO DISCOVER, REFER OUT FOR TREATMENT PEOPLE WITH VASCULAR RINGS, AND THEY DIDN'T DO IT.

AND IF THEY SAID – WELL, NO ONE HAS EVER BEEN ABLE TO SAY WHY THEY MISSED THE VASCULAR RING. THEY JUST MISDIAGNOSED IT OR THE HOSPITAL DIDN'T HAVE IT IN THE RECORD, ONE OR THE OTHER, BUT IT IS NEVER MENTIONED ANYWHERE BY THESE DOCTORS THAT THEY RULED OUT, THEY CONSIDERED, OR DID ANYTHING ABOUT THIS VASCULAR RING, AND IT'S UN – THERE'S NO DISPUTE THAT THE CHILD HAD IT.

THERE'S NO DISPUTE THAT HE HAD ALL THE PROBLEMS PRIOR TO THE FINDING OF THE VASCULAR RING THAT REQUIRED SURGERY FOR A VASCULAR RING, AND IF YOU HAVE THOSE, THERE – IT'S LIKE PLAYING MONOPOLY. YOU DO NOT PASS GO. YOU GO [29] DIRECTLY TO SURGERY. YOU GO DIRECTLY TO REMOVE THE VASCULAR RING. YOU DO NOT PASS GO, AND YOU DO NOT COLLECT $200.

THEY IGNORED THAT. THEY DID NOT GET IT TO ANYONE TO ADDRESS THE VASCULAR RING, AND THAT'S WHY WE'RE HERE TODAY, AND HE HAS THE EXPERTISE TO TESTIFY ABOUT THAT, AND I THINK THAT'S ALL WE GOT TO DO TO SHOW THAT HE HAS IT; THAT HE WORKS WITH THESE PEOPLE; HE DEALS WITH THIS; HE HAS KNOWLEDGE OF WHAT THESE PEOPLE DO; AND THAT HE'S ABLE TO TESTIFY ABOUT WHAT THE PROBLEM WAS THAT WAS CAUSING THIS BABY'S PROBLEM AND HAS THE

EXPERTISE AS TO WHAT SHOULD HAVE BEEN DONE.

THE COURT: HAS DR. SCHWARTZ BEEN DEPOSED?

MR. DAUGHERTY: NO, THEY HAVEN'T. WE HAVE – AS I SAID, WE DID DEPOSE THE DEPOSITION OF DR. KANTER. THAT WAS THE DOCTOR HERE AT EGLESTON THAT ACTUALLY TESTIFIED AGAINST THESE OTHER DOCTORS AND SAID THIS CHILD SHOULD HAVE NEVER HAD THIS TRACH IN. AS SOON AS THEY FOUND THAT VASCULAR RING, THEY SHOULD HAVE IMMEDIATELY REMOVED THAT VASCULAR RING AND HIS TRACH COULD HAVE BEEN TAKEN OUT TWO-AND-A-HALF YEARS AGO. THEY IGNORED IT, AND DIDN'T DO IT, AND THAT SHOULD HAVE BEEN DONE.

HE'S ALREADY TESTIFIED ABOUT THAT, JUDGE. WE TOOK HIS DEPOSITION, AND HE'S ALREADY TESTIFIED ABOUT THAT UNEQUIVOCALLY, AND HE TEACHES AT EMORY, AND HE'S – HE'S [30] GIVEN THAT OPINION, AND HE'S COME FORWARD AGAINST THESE – AND HE SAID THAT. WE HAVE HIS DEPOSITION. SO HE ESSENTIALLY SAYS PRETTY MUCH THE SAME THING AS

DR. SCHWARTZ SAYS, IS THAT I'M A VASCULAR SURGEON. I DEAL WITH VASCULAR RINGS. THEY HAVE THESE PROBLEMS. THEY DEAL WITH THESE PEOPLE'S – HE SHOULD HAVE

GOTTEN THIS OVER EITHER TO DR. KANTER OR SOMEBODY LIKE DR. SCHWARTZ AND THE VASCULAR RING SHOULD HAVE BEEN REMOVED. THAT'S WHAT THEY'RE TESTIFYING ABOUT, AND THAT'S WHAT DR. SCHWARTZ IS TESTIFYING ABOUT.

WE'RE NOT GOING INTO DID THEY NEGLIGENTLY PERFORM A SCOPE. DID THEY NEGLIGENTLY DO ANYTHING. WE'RE NOT GOING INTO ANY OF THAT. THERE'S NOT ANYTHING TESTIFYING ABOUT ANY NEGLIGENT PROCEDURE OF THESE DOCTORS.

WHAT WE'RE TALKING ABOUT IS THE FACT THAT THESE DOCTORS HAD AN ABSOLUTE PROBLEM. THEY DID PROCEDURES THAT WERE NOT NECESSARY BECAUSE THESE WERE FROM – WERE CLEARLY FROM A VASCULAR RING. THEY DIDN'T DO ANY TREATMENT. THEY TIED OFF SALIVARY GLANDS TO –

THE COURT: COUNSEL, I JUST REALLY NEED TO HEAR AS TO THE EXPERT AFFIDAVIT ISSUE. I UNDERSTAND –

MR. DAUGHERTY: I UNDERSTAND THAT, BUT WHAT I'M TRYING TO SAY, AND HE HAS – I MEAN I DON'T KNOW, I THINK FOR TEACHING AND WORKING WITH THESE DOCTORS AND PERFORMING THIS SURGERY FOR 30 YEARS MAKES HIM – AND TEACHING AS A [31] PROFESSOR MAKES HIM QUALIFIED, FAR EXCEEDS THE DALBERT OR ANYTHING AND MAKES HIM

QUALIFIED TO GIVE HIS OPINION IN THIS CASE ABOUT VASCULAR RINGS, AND THIS IS ABOUT VASCULAR RINGS AND COMPLICATIONS AND PROBLEMS THAT WERE CAUSED FOR THE FAILURE TO TREAT AND SEND UP A DIAGNOSIS OF VASCULAR RING. THAT'S WHAT THIS CASE IS ABOUT, PERIOD.

THE COURT: THANK YOU, COUNSEL.

MS. KRIVITSKY: YOUR HONOR, MAY I ADD SOMETHING, PLEASE?

MR. DAUGHERTY: SHE'S THE BRAIN.

MS. KRIVITSKY: NO, NOT AT ALL. I KNOW I BLURTED SOMETHING OUT EARLIER, SO I APOLOGIZE TO THE COURT, BUT IS IT OKAY IF I ADD?

THE COURT: WOULD YOU TELL ME WHO YOU ARE, PLEASE.

MS. KRIVITSKY: SURE. MY NAME IS ALINA KRIVITSKY, AND I'M ALSO HERE WITH MR. DAUGHERTY ON BEHALF OF THE PLAINTIFFS.

THE COURT: ALL RIGHT.

MS. KRIVITSKY: AND I JUST WANTED TO TALK A LITTLE BIT MORE ABOUT THE *COTTEN V. PHILLIPS* CASE AND TO QUOTE DIRECTLY FROM IT.

THE COURT FOUND THAT A MEDICAL DOCTOR – THIS IS SPECIFICALLY IN THE LANGUAGE OF THE CASE – A MEDICAL DOCTOR BELONGING TO SPECIALTY-A CAN RENDER AN OPINION ABOUT THE ACTS OR OMISSIONS OF ANOTHER DOCTOR BELONGING TO [32] SPECIALTY-B, SO LONG AS THE OPINION OF THE EXPERT WITNESS BELONGING TO SPECIALTY-A PERTAINS TO SPECIALTY-A. SO THE ONLY ISSUE IS WHETHER THE OPINION OF DR. SCHWARTZ, WHO BELONGS TO THE SPECIALTY OF PEDIATRIC SURGERY, PERTAINS TO PEDIATRIC SURGERY, AND IF YOU LOOK AT HIS OPINION AND IF YOU LOOK AT THE ACTS OF NEGLIGENCE THAT HE TESTIFIES TO, THE ONLY THING THAT HE TALKS ABOUT IS THE VASCULAR RING AND THE MISDIAGNOSIS OF THE VASCULAR RING. HE DOES NOT GO INTO ANYTHING ELSE ASIDE FROM THAT ISSUE. THAT IS THE ONLY ISSUE THAT HE TALKS ABOUT IN HIS ENTIRE OPINION.

SO THE QUESTION IS WHETHER OR NOT HIS EXPERTISE IN PEDIATRIC SURGERY PERTAINS TO THE ISSUE OF VASCULAR RING. WHEN WE FILED OUR SUPPLEMENTAL AFFIDAVIT, HE TALKED ABOUT – I DON'T HAVE IT IN FRONT OF ME, BUT THE LANGUAGE OF HIS SUPPLEMENTAL AFFIDAVIT SAID –

MR. DAUGHERTY: HERE IT IS.

MS. KRIVITSKY: THANK YOU. HE SAID, AS A BOARD CERTIFIED PEDIATRIC SURGEON, I HAVE THE TRAINING, KNOWLEDGE, AND EXPERIENCE TO DIAGNOSE AND SURGICALLY MANAGE CHILDREN WITH VASCULAR RINGS, WHICH IS THE MEDICAL CONDITION AT ISSUE IN THIS CASE.

THAT'S THE ONLY QUESTION. IS HE QUALIFIED TO TALK ABOUT VASCULAR RING? YES. AS A PEDIATRIC SURGEON, HE IS QUALIFIED TO TALKED [sic] ABOUT VASCULAR RING. THE ISSUE IS NOT [33] WHETHER, AS A PEDIATRIC SURGEON, HE IS QUALIFIED TO TALK ABOUT NEONATOLOGY OR QUALIFIED TO TALK ABOUT OTOLARYNGOLOGY; IT IS, IS HE QUALIFIED TO TALK ABOUT VASCULAR RING. THE ANSWER IS, YES.

I THINK THE OTHER CASE, I DON'T HAVE IT IN FRONT OF ME, THE NAME OF IT, BUT THERE'S ANOTHER CASE THAT CAME OUT YESTERDAY THAT I THINK WE GAVE TO YOU AS WELL.

THE COURT: THANK YOU, COUNSEL.

ANYTHING FURTHER ON BEHALF OF THE PLAINTIFF? ANY REBUTTAL?

MR. TANNER: YES, YOUR HONOR, VERY BRIEFLY. FIRST, TO ADDRESS THESE TWO CASES THAT WE'VE TALKED ABOUT, THE *COTTEN* CASE AND THE NEW ONE YESTERDAY. THE *COTTEN* CASE, I WOULD POINT OUT TO THE

COURT, WAS NOT AN AFFIDAVIT CASE. THE *COTTEN* CASE WAS A MOTION IN LIMINE THAT WAS FILED, I ASSUME IT WAS SHORTLY BEFORE TRIAL, BECAUSE THE CASE CAME OUT JUST RECENTLY IN 2006, AND THE NEGLIGENT SURGERY ALLEGEDLY HAPPENED IN 1999.

SO WE'RE CLEARLY DEALING WITH A DIFFERENT ISSUE THERE, AND THAT'S WHY I WENT OUT OF MY WAY IN THE BEGINNING TO SAY WE'VE GOT TO REMEMBER WE'RE DEALING WITH THE AFFIDAVIT STATUTE HERE. THE AFFIDAVIT SAYS YOU HAVE TO HAVE THE KNOWLEDGE TO TALK ABOUT VIOLATION OF THE STANDARD OF CARE.

WHAT THEY WANTED TO TALK ABOUT IN THE *COTTEN* CASE MAY [34] HAVE BEEN RELEVANT TO SOME OTHER ISSUE, AND, IN FACT, I BELIEVE THE *COTTEN* CASE REALLY SUPPORTS MY VIEW OF THIS BECAUSE IT SPECIFICALLY SAYS, TALKING ABOUT DR. PHILLIPS, WHO WAS NOT OF THE SAME SPECIALTY AS DR. COTTEN, QUOTE, IT DOES NOT APPEAR FROM THE EVIDENCE IN THE RECORD THAT PHILLIPS EVER ALLEGED THAT COTTEN WAS NEGLIGENT IN HIS PERFORMANCE OF THE TOTAL KNEE REPLACEMENT SURGERY.

SO APPARENTLY THIS ONE DOCTOR WASN'T EVEN GOING TO TALK ABOUT THE SPECIFIC ACT OF NEGLIGENCE THAT WAS OR WAS NOT

PRESENT, AS YOU WOULD NEED IN AN AFFIDAVIT. SO IT'S DISTINGUISHABLE.

THE NEW CASE, THE ONE FROM YESTERDAY, I BELIEVE, AND I'VE ONLY SKIMMED IT, BUT I BELIEVE THAT'S A SPINAL SURGERY CASE, AND YOU HAVE TWO PHYSICIANS WHO ARE SURGEONS, ONE AN ORTHOPEDIST AND ONE A NEUROSURGEON, I BELIEVE, AND THEY BOTH PERFORMED SURGERY ON THE SPINE.

SO IF I'M CORRECT ABOUT THAT, WHAT WE CAN TAKE FROM THOSE TWO CASES IS THERE IS CERTAINLY NO BRIGHT LINE THAT SAYS IF YOU WANT TO CRITICIZE A NEONATOLOGIST, YOU HAVE TO BE A NEONATOLOGIST. WE ACCEPT THAT. SO IF THAT'S WHAT THE PLAINTIFFS' ARGUMENT IS, THAT'S TRUE.

WHERE THEY DON'T MEET THEIR BURDEN IS ON THE ABILITY TO SAY WHAT THE STATUTE REQUIRES THAT THEY SHOW IS THEY HAVE KNOWLEDGE OF WHAT THE DEFENDANT DOES WITHIN THE DEFENDANT'S NORMAL PRACTICE SUCH THAT THEY CAN SAY THAT [35] THE DEFENDANT WAS OUTSIDE OF THE USUAL CUSTOMARY PRACTICE UNDER THE LIKE OR SURROUNDING CIRCUMSTANCE FOR THAT PRACTICE.

AND I THINK MR. DAUGHERTY, IN ONE OF HIS COMMENTS, ACTUALLY MADE MY POINT FOR ME. HE SAID THAT THIS CASE IS ABOUT A FAILURE TO DIAGNOSE A VASCULAR RING. I

BELIEVE I'M QUOTING YOU PRETTY CLOSELY, QUOTE, THEY, MEANING THE DEFENDANT DOCTORS, ARE SUPPOSED TO REFER THEM OVER TO HIM, MEANING THE SURGEON, WHENEVER THEY FIND A VASCULAR RING, END QUOTE. AND THAT'S THE ESSENCE OF WHAT DR. SCHWARTZ IS SAYING. HE SAYS, YES, THEY'RE SUPPOSED TO SEND ME THESE VASCULAR RINGS WHEN THEY FIND THEM.

WHAT IS MISSING AND WHY I BELIEVE THE MOTION IS SOLID IS THAT WE DON'T HAVE AN EXPERT COMPETENT TO TESTIFY THAT UNDER THE LIKE SURROUNDING CIRCUMSTANCES OF THIS CASE, A NEONATOLOGIST FACING THE ENTIRE CONSTELLATION OF SYMPTOMS THAT THE PATIENT PRESENTED WOULD BE EXPECTED TO SORT THROUGH ALL THE THINGS GOING ON WITH THIS CHILD AND COME TO THIS DIAGNOSIS THAT THAT SPECIALTY WOULD BE EXPECTED TO HAVE THAT KNOWLEDGE TO MAKE THAT CALL. THAT'S WHAT DR. SCHWARTZ DOES NOT DEFINE THAT HE HIMSELF HAS THE BACKGROUND AND EXPERTISE TO SAY. THAT'S WHAT'S MISSING, AND IT'S ON THAT BASIS THAT I BELIEVE THAT THE MOTION SHOULD BE GRANTED.

I WOULD POINT OUT ONLY ONE OTHER THING. [36] MR. DAUGHTERTY INDICATED THAT THE DEFENDANTS ADMITTED THAT THEY KNEW THERE WAS A VASCULAR RING. THE RECORD IS SIMPLY NOT ACCURATE ON

THAT. THE DEFENDANTS THAT I REPRESENT NEVER ADMITTED THAT THEY KNEW THERE WAS A VASCULAR RING. IF SOMEONE HANDS YOU A DIAGNOSIS, THEN IT'S NOT THAT HARD TO SEND THEM OVER TO ANOTHER SPECIALIST.

IN THE CANCER ANALOGY MR. DAUGHTERTY GAVE, I THINK THAT'S TRUE. ANY DOCTOR WHO IS TOLD YOU GOT CANCER WILL SAY, GO TO THE CANCER DOCTOR. THE QUESTION IS, ARE YOU SUPPOSED TO, IF YOU ARE A GENERAL PRACTITIONER, FIGURE OUT THAT THERE'S CANCER THERE? AND BY ANALOGY, THE SAME SITUATION IN OUR CASE, IF YOU ARE A NEONATOLOGIST, ARE YOU SUPPOSED TO FIGURE OUT THAT THERE'S A VASCULAR RING FROM THE SYMPTOMS THAT YOU'VE GOT ON A COMPLEX CASE?

I SUBMIT THAT DR. SCHWARTZ HAS NOT SHOWN HIMSELF SUFFICIENTLY KNOWLEDGEABLE ABOUT THE PRACTICE OF MEDICINE FROM THAT STANDPOINT TO MAKE THAT CALL. THANK YOU, YOUR HONOR.

THE COURT: THANK YOU, COUNSEL.

MS. COTY: YOUR HONOR, MR. DAUGHTERTY SAID A LOT IN ADDRESSING THE COURT, SOME OF WHICH, FROM OUR PERSPECTIVE, CERTAINLY MISREPRESENTED SOME OF THE TESTIMONY GIVEN TO DATE. BECAUSE MUCH OF WHAT HE SAID IS NOT RELATED TO THE

MOTION TO DISMISS OR DR. SCHWARTZ'S QUALIFICATIONS, I HOPE, IN MY REBUTTAL, TO REALLY FOCUS ONLY ON WHAT IT IS [37] THAT HE SAID THAT REALLY IS RELEVANT TO THE MOTION THAT'S CURRENTLY BEFORE THE COURT.

IN TERMS OF THE CASES THAT WERE CITED BY PLAINTIFFS' COUNSEL, IT REALLY DOESN'T SHED LIGHT ON OR REPRESENT ANYTHING DIFFERENT THAN WHAT'S ALREADY BEFORE THE COURT BECAUSE IT DOESN'T CHANGE THE FACT THAT IN THE CASES CITED, JUST AS IN PREVIOUS CASES, IT MAKES CLEAR THAT IF SOMEONE IS FROM A DIFFERENT SPECIALTY THAT THERE HAS TO BE OVERLAP IN THE TREATMENT OF THE CONDITION IN ORDER FOR THE EXPERT FROM ONE PROFESSION OR ONE SPECIALTY TO BE COMPETENT TO TESTIFY ABOUT AN EXPERT FROM ANOTHER SPECIALTY, AND THAT'S EXACTLY THE SAME IN TERMS OF WHAT WAS SET FORTH IN THE *BENNETT VS. BUTLIN* CASE AND THE *SANFORD VS. HOWARD* CASE.

SO, REALLY, THE *COTTEN* CASE AND THE NEW CASE, I BELIEVE IT WAS *ABRAMSON*, THAT CAME OUT YESTERDAY, IT REALLY SIMPLY EXPANDS ON THAT AND SETS FORTH THE SAME PROPOSITION THAT'S ALWAYS EXISTED AND DOESN'T CHANGE THE FACT THAT DR. SCHWARTZ DOES NOT HAVE THE KNOWLEDGE AND EXPERIENCE TO BE ABLE TO SAY WHAT A

PEDIATRIC OTOLARYNGOLOGIST DOES ON A DAY-TO-DAY BASIS OR TO COMMENT ON WHETHER OR NOT WHAT THEY DID WAS NEGLIGENT.

AND, LIKEWISE, IN TERMS OF THE STATUTE THAT'S AT ISSUE, IT MAKES VERY CLEAR THAT IN TERMS OF THE REQUIREMENTS OF AN AFFIDAVIT THAT THE PLAINTIFFS MUST [38] DEMONSTRATE THAT THEIR AFFIANT HAS ACTUAL KNOWLEDGE AND EXPERIENCE IN TERMS OF THE ACTUAL PROCEDURES AND TREATMENT THAT'S AT ISSUE IN THE CASE.

THIS ISSUE – THE CASE AT HAND IS NOT JUST ABOUT VASCULAR RINGS, BUT IF YOU ARE SAYING THAT A PROCEDURE WAS NOT NECESSARY BECAUSE OF THE PRESENCE OR AN ABSENCE OF A VASCULAR RING OR BECAUSE A VASCULAR RING WAS OR WAS NOT SYMPTOMATIC, THEN YOU MUST ROUTINELY ASSESS, DIAGNOSE, AND TREAT THOSE VERY ISSUES IN ORDER TO BE ABLE TO SAY THAT THOSE PROCEDURES SHOULD NOT HAVE BEEN PERFORMED AND THAT IT WAS NEGLIGENT TO PERFORM THEM.

I NOTED THAT MR. DAUGHTERTY [sic] SAID THAT DR. SCHWARTZ WORKS WITH ENT'S. THERE'S A REASON THAT HE WORKS WITH ENT'S AND THAT'S BECAUSE HE'S NOT AN ENT.

IF HE HAD THE CREDENTIALS, THE EXPERIENCE, THE COMPETENCY TO DO ALL OF

THE THINGS THAT ENT'S OR PEDIATRIC OTOLARYNGOLOGISTS DO, HE WOULDN'T NEED TO WORK WITH ENT'S, BECAUSE HE WOULD BE ABLE TO BE OUT THERE PERFORMING THOSE PROCEDURES HIMSELF; BUT, IN FACT, THEY'RE SEPARATE AND DISTINCT AREAS WITH DIFFERENT TRAINING, DIFFERENT QUALIFICATIONS WHERE THEY PERFORM DIFFERENT PROCEDURES AND DIFFERENT TREATMENTS.

THE OTHER THING THAT I NOTED WAS THAT DR. SCHWARTZ AND HIS AFFIDAVIT COMMENTS ON THE FACT THAT HE DOES SURGERY ON VASCULAR RINGS AFTER THE FACT, AFTER THE [39] DIAGNOSIS. DR. SCHWARTZ DOESN'T ASSESS, DIAGNOSE COMPLEX AIRWAYS, WHICH IS WHAT THE ISSUE IS IN THIS CASE; WAS THE COMPLEX AIRWAY OBSTRUCTION OF N.S. APPROPRIATELY ASSESSED, DIAGNOSED, AND TREATED, AND THAT'S NOT WHAT DR. SCHWARTZ DOES.

WHAT HAPPENS IS THE PEDIATRIC OTOLARYNGOLOGIST IS OUT ASSESSING THESE THINGS. DR. SCHWARTZ COMES IN AFTER THE FACT. HE COMES IN ONCE SOMEBODY LIKE MY CLIENT REFERS A PATIENT OVER TO HIM FOR DIVISION OF A VASCULAR RING. MY CLIENTS, DR. GOWER AND DR. THOMSEN, ASSESS WHETHER A VASCULAR RING IS OBSTRUCTIVE OR SYMPTOMATIC. THEY ASSESS WHAT IS THE CAUSE OF AN AIRWAY OBSTRUCTION IN A

COMPLEX AIRWAY OF AN INFANT THE AGE OF N.S.

DR. SCHWARTZ IS NOT IN THAT ROLE, AND HE'S NEVER STOOD IN THE SHOES OF DR. GOWER OR DR. THOMSEN IN TERMS OF ASSESSING, DIAGNOSING, AND TREATING OBSTRUCTIVE AIRWAY DISORDERS, AND FOR THAT REASON, WE WOULD SUBMIT THAT DR. SCHWARTZ IS NOT QUALIFIED TO PROVIDE EXPERT TESTIMONY AGAINST DR. GOWER AND DR. THOMSEN AND THAT PLAINTIFFS' AFFIDAVIT IS INSUFFICIENT.

THE COURT: THANK YOU, COUNSEL.

MR. DAUGHERTY: THAT'S NOT WHAT HE SAID IN HIS AFFIDAVIT, JUDGE, IF YOU'LL READ HIS AFFIDAVIT. HE DOES DIAGNOSE AND TREAT VASCULAR RINGS HIMSELF. I JUST WANT TO PUT THAT OUT. CONTRARY TO WHAT THEY SAY, HE DOES DIAGNOSE [40] HIMSELF AND TREAT THEM.

THE COURT: IS THERE ANYTHING FURTHER THE PLAINTIFF WISHES TO PUT BEFORE THE COURT AS TO THE ISSUE ON WHETHER THE EXPERT IS COMPETENT TO TESTIFY FROM THE AFFIDAVIT?

MS. KRIVITSKY: I HAVE ONE MORE THING I WANTED TO ADD.

THE COURT: ALL RIGHT.

MS. KRIVITSKY: MS. COTY MENTIONED THAT, I THINK, TWO CASES THAT TALK ABOUT THAT THERE HAS TO BE AN OVERLAP BETWEEN THE TWO DIFFERENT SCHOOLS OF MEDICINE IN ORDER FOR THE EXPERT TO BE QUALIFIED TO RENDER AN OPINION AGAINST THE NEGLIGENT DOCTOR, AND ALTHOUGH I DISAGREE WITH HER READING OF THE CASES, IN LIGHT OF THE NEWLY-AMENDED STATUTE AND THE INTERPRETATION OF THAT STATUTE, I WILL SAY THAT THE OVERLAP BETWEEN THESE TWO AREAS – THESE TWO SCHOOLS OF MEDICINE, THERE IS AN OVERLAP AS IT PERTAINS TO THIS CASE BECAUSE THE METHOD OF TREATMENT IS EXACTLY THE SAME. THAT IS THE KEY. THE METHOD OF TREATMENT IS SAME.

THERE'S ONLY ONE METHOD OF TREATMENT. YOU REFER THE CHILD TO SURGERY BECAUSE THE VASCULAR RING HAS TO BE SURGICALLY DIVIDED. THAT'S IT. THERE ARE NOT TEN DIFFERENT WAYS TO TREAT IT. THERE'S NO MEDICINE. THERE'S ONLY SURGERY. AND WHAT WE'RE SAYING THAT THEY DID WRONG IS THEY DID NOT REFER HIM OUT TO TREATMENT. THEY DID NOT REFER HIM TO A SURGEON. [41] THE CHILD'S VASCULAR RING WASN'T DIVIDED UNTIL HE WAS TWO-AND-A-HALF YEARS OLD, BUT BECAUSE THE METHOD OF TREATMENT IS THE SAME BETWEEN THE TWO SCHOOLS OF MEDICINE, THERE IS AN

OVERLAP SUFFICIENTLY TO RENDER OUR EXPERT QUALIFIED TO GIVE THIS OPINION EITHER UNDER THE CASES THAT SHE CITED, UNDER THE NEW CASES THAT WE CITED, UNDER 24-9-67.1, UNDER 9-11-9.1. IT DOESN'T MATTER. EITHER WAY YOU INTERPRET IT, OUR EXPERT IS QUALIFIED.

THE COURT: THANK YOU, COUNSEL,

IS THERE ANYTHING FURTHER PLAINTIFF NEEDS TO PRESENT IN TERMS OF THE EXPERT AFFIDAVIT ISSUE?

MR. DAUGHERTY: I PRESUME THAT YOU DID – UNDER THE CASE LAW, YOU DID ACCEPT AND REVIEW IT AND CONSIDER IT, I WOULD PRESUME, BECAUSE THEY SAID WE COULD. I JUST WANT – THAT YOU DID DO THAT, BECAUSE THE COURT SAYS WE COULD FILE SUBSTANTIVE PROOF FOR AN AFFIDAVIT. UNDER THAT CASE, WE DID DO IT, YOU DO HAVE IT, AND I PRESUME YOU DID ACCEPT IT.

THE COURT: WE DO HAVE YOUR MOTION TO SUPPLEMENT THE AFFIDAVIT.

MR. DAUGHERTY: I PRESUME YOU ARE CONSIDERING THAT IN THIS HEARING. THAT'S ALL –

THE COURT: I HAVE IT IN THE FILE FOR CONSIDERATION IN CONNECTION WITH THE MOTION TO DISMISS.

MR. DAUGHERTY: THANK YOU, MA'AM, APPRECIATE IT.

[42] THE COURT: ANYTHING FURTHER ON BEHALF OF THE DEFENDANTS?

MR. TANNER: NO, YOUR HONOR.

MS. COTY: NO, YOUR HONOR.

THE COURT: LADIES AND GENTLEMEN, OBVIOUSLY, I NEED SOME TIME TO REVIEW YOUR ARGUMENT AND THE FILE, AND WE WILL TAKE THE MATTER UNDER ADVISEMENT AND GIVE YOU A DECISION AS SOON AS POSSIBLE.

MR. DAUGHERTY: THANK YOU.

* * *

CERTIFICATE

STATE OF GEORGIA,

COUNTY OF DEKALB:

I DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT OF THE PROCEEDINGS TAKEN DOWN BY ME IN THE CASE AFORESAID. THIS CERTIFICATION IS EXPRESSLY WITHDRAWN AND DENIED UPON THE DISASSEMBLY OR PHOTOCOPYING OF THE FOREGOING TRANSCRIPT, OR ANY PART THEREOF, UNLESS SAID DISASSEMBLY OR PHOTOCOPYING IS DONE BY THE UNDERSIGNED CERTIFIED COURT REPORTER AND

ORIGINAL SIGNATURE AND SEAL IS ATTACHED THERETO.

THIS, THE 16TH DAY OF MARCH, 2007.

/s/ D. Karampelas
DIANNE M. KARAMPELAS
CERTIFIED COURT
REPORTER
B-1975